TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1948

No. 53

CLYDE WILKERSON, PETITIONER,

vs.

WILSON McCARTHY AND HENRY SWAN, AS TRUSTEES OF THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF UTAH

PETITION FOR CERTIORARI FILED MAY 10, 1948.
CERTIORARI GRANTED OCTOBER 11, 1948.

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INDEX

	Original	Print
Record from District Court of the Third Judicial District, in and for Salt Lake County, State of Utah	1	1
Complaint	1	1
Answer	6	5
Minute orders of trial	8	6
Defendant's motion for directed verdict	10	8
Verdict	13	10
Judgment on verdict	14	10
Notice of appeal	15	11
Order settling bill of exceptions	16	11
Clerk's certificate (omitted in printing)	17	
Portions of the bill of exceptions	18	12
Testimony of Gordon H. Arbogast	18	12
Clyde Wilkerson	41	31
Everette William Elledge	72	55
Anders G. Johnson	94	72
Everette William Elledge (recalled)	105	80
George P. Hawkins	105	80
Clyde Wilkerson (recalled)	129	98
Clyde Wilkerson (rebuttal)	134	102
Gordon H. Arbogast (recalled)	135	103
Clyde Wilkerson (recalled)	137	105

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—5772

	Original	Print
Record from District Court of the Third Judicial District, in and for Salt Lake County, State of Utah—Continued		
Portions of the bill of exceptions—Continued		
Reporter's certificate (omitted in printing)	140	
Proposal for settlement of bill of exceptions	141	106
Order settling bill of exceptions	143	107
Proceedings in the Supreme Court of Utah	145	109
Appellant's statement of errors relied upon for reversal	145	109
Opinion, Latimer, J.	146	109
Dissenting opinion, Wade, J.	164	125
Judgment	171	129
Grounds relied upon by appellant in support of his petition for rehearing	172	129
Order denying petition for rehearing	173	130
Praecipe for record	174	130
Clerk's certificate (omitted in printing)	178	
Exhibit 1—Photograph of scene of accident	179	132
Exhibit 5—Photograph of scene of accident	180	132
Order allowing certiorari	181	133

fol. 1]

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT, IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

77564

CLYDE WILKERSON, Plaintiff,

vs.

WILSON MCCARTHY and HENRY SWAN, as Trustees of The Denver and Rio Grande Western Railroad Company, a Corporation, Defendants

COMPLAINT—Filed May 27, 1946

Comes now the plaintiff and for cause of action against the defendants, complains and alleges:

1. That at all times herein mentioned the defendant, Denver & Rio Grande Western Railroad Company, was, and now is, a corporation duly organized and existing under and by virtue of the laws of the State of Delaware, and authorized to do business in the State of Utah as a foreign corporation, with its principal place of business in Utah, at Salt Lake City, Utah, and that prior to the occurrence of the grievances herein complained of, the defendants, Wilson McCarthy and Henry Swan, were duly appointed trustees of all of the property of the defendant, Denver & Rio Grande Western Railroad Company, by the United States District Court for the District of Colorado in reorganization proceedings then and therein pending under the provisions of Section 77, Chapter VIII, of the Federal Bankruptcy Act, as amended, and that at all times herein mentioned all of the property of the defendant, Denver & Rio Grande Western Railroad Company, was in the possession and control of said defendant trustees, and said defendant trustees ever since their said appointment fol. 2] have been, and now are, operating the railroad and all of the property of the defendant, Denver & Rio Grande Western Railroad Company, under the orders and directions of the said United States District Court.

2. That at all times herein mentioned, the defendants were acting as a common carrier by railroad and engaged

in interstate commerce and the injuries to plaintiff hereinafter complained of arose in the course of and while plaintiff and said defendants were engaged in the conduct of interstate commerce.

3. That this action is brought under and by virtue of the provisions of the Federal Employers' Liability Act, 45 U. S. C. A., 51 et seq.

4. That the accident causing injuries to plaintiff and out of which this cause of action arose happened at about the hour of 10:30 A. M., on the 26th day of July, 1945, as a result of plaintiff falling into the wheel pit at a point a short distance to the west of the west rail of Track No. 23½ in defendants' coach yards in Denver, Colorado.

5. That at the time of the occurrence of the grievance herein complained of and for a long time prior thereto, the plaintiff had been employed by defendant as a switchman in defendants' yards in Denver, Colorado, and in the usual and ordinary performance of his duties as a switchman it became and was his duty to work upon and along the various switch and lead tracks within defendants' said yards in Denver, Colorado.

6. That shortly prior to the occurrence of the grievance herein complained of, it became and was necessary for plaintiff to be and to work within the vicinity of Switch Track No. 23½ at and near the point where said track passes over the wheel pit; that said track No. 23½ extends through a portion of said yards in a northerly and southerly direction; that the wheel pit is approximately 11 feet deep and 4½ feet wide, with cement walls and floor, and passes [fol. 3] underneath said Track No. 23½ and other switch tracks and extends through a portion of said yards in an easterly and westerly direction, and that in the performance of his duties under his employment as a switchman it became and was necessary for plaintiff to cross over said wheel pit at a point several feet west of the west rail of said Track No. 23½ and while passing over said wheel pit, due to the negligence, carelessness and recklessness of the defendants hereinafter alleged, plaintiff was caused to and did lose his footing and fall violently to the bottom of said wheel pit, and to thereby sustain the grievous personal injuries, loss and damage herein set forth.

7. That defendants, and each and all of them, were careless, reckless and negligent at said time and place aforesaid in the following particulars:

A. That defendants failed and neglected to furnish plaintiff a safe place wherein and whereon to do and perform the duties necessarily incident to his employment, in this, that it failed to place a safe or substantial covering over the top of said wheel pit at the point where plaintiff and other switchmen were required to cross and pass over said pit in the usual and ordinary performance of their duties, but, on the contrary, caused to be placed over the top of said wheel pit a loose plank which was not firmly set, affixed or attached to the side walls of said pit and that due to the insecure fashioning and installation of said plank the footing was insecure and infirm and said plank would and did turn and shift as men were walking over it, and as a result of said condition the plaintiff, while passing over said plank, was caused to lose his balance and to fall violently to the bottom of said pit and thereby sustain the grievous personal injuries herein complained of.

B. That defendants failed to furnish plaintiff a safe place wherein and whereon to do and perform the usual and [fol. 4] ordinary duties incident to his employment, in this, that they required him to pass over the wheel pit aforesaid in the performance of his duties at a time when the plank placed across the top of said wheel pit was insecurely attached and due to said condition plaintiff was thereby subjected to an uncommon hazard and danger which made the performance of his duties dangerous and unsafe, and that while engaged in passing over said wheel pit in the usual and ordinary performance of his duties he lost his balance and fell to the bottom of said pit and thereby sustained the grievous personal injuries, loss and damages herein complained of.

C. That the defendants failed to furnish plaintiff a safe place wherein and whereon to do, perform and discharge his duties necessarily incident to his said employment, in that they failed to furnish a safe walkway across and over said wheel pit, but in lieu thereof placed across said wheel pit, for the use of its switchmen and other employees in crossing over said pit, a single plank approximately 20 inches in width, and that at the time plaintiff was required

to cross over said pit on the plank aforesaid, the defendants had caused and permitted grease, oil and other slippery substance to accumulate and remain upon said plank; that as plaintiff stepped upon said plank to cross over said pit, due to the narrow width of said plank and the grease and oil thereon plaintiff was caused to slip, lose his balance and fall to the bottom of said wheel pit and thereby sustain the grievous personal injuries, loss and damage herein complained of.

8. That by reason of each and all of the aforesaid acts of negligence on the part of the defendants, and each of them, in the maintenance and management of their yards and tracks as herein set forth, combined and concurring, the plaintiff, while in the usual, ordinary and customary performance of his duties was caused to fall to the bottom of the wheel pit aforesaid and to thereby suffer the grievous injuries, loss and damage herein set forth.

[fol. 5] 9. That as a direct and proximate result of the negligent acts and conduct of the defendants aforesaid, plaintiff was rendered sick, sore, lame, disabled and disordered, both externally and internally, and received the following injuries, to wit:

A. A severe sprain of the right ankle.

B. Severe and painful bruises, contusions, lacerations and wounds on his right hand and forearm.

C. Fracture of two ribs on the right side, causing said ribs to be torn from their attachment to the breast-bone.

10. Plaintiff further alleges that as a direct and proximate result of the careless, reckless and negligent conduct of the defendants as herein alleged, he suffered and has continued to suffer severe shock to his nervous system and injury and impairment to his general health, and that he has suffered mental — physical pain ever since said accident occurred and is reasonably certain he will suffer mental and physical pain for a long time in the future; that due to his injuries aforesaid, the plaintiff was disabled and for that reason unable to engage in any gainful occupation whatsoever for a period of approximately three months, and that since returning to his employment he has continually suffered from pain in his right arm and right ankle, has been nervous, indisposed and unable to rest properly and that he has suffered from unnatural and

uncommon fatigue in the performance of his work and from a general disability.

11. That as a result of the injuries suffered by plaintiff as herein alleged, he was caused to lose earnings from his employment for a period of approximately three months, and that he has suffered pain, injury and physical disability ever since said accident occurred all to his damage in the sum of $10,000.00.

Wherefore, Plaintiff Prays judgment against the defendants and each and all of them, in the sum of $10,000.00, and for his costs herein expended.

Rawlings, Wallace & Black, Attorneys for Plaintiff.

(Duly verified.)

[fol. 6] In District Court of Salt Lake County

Answer—Filed June 19, 1946

Come now the defendants and answer the complaint as follows:

1. Admit the allegations contained in paragraphs I, II and III.

2. Answering paragraphs IV, V, VI, VII, VIII, IX and XI, defendants admit that plaintiff on July 26, 1945, at about 10:30 a. m., fell into the wheel pit in defendants' coach yards in Denver, Colorado; that prior to the time of said accident plaintiff was employed as a switchman in defendants' yards in Denver, Colorado; that Track No. 23½ extends in a northerly and southerly direction through a portion of defendants' yards; that the wheel pit is approximately 11 feet deep, 4½ feet wide, with cement walls and floor, and passes underneath Track No. 23½ and other switch tracks in an easterly and westerly direction; that plaintiff fell to the bottom of said wheel pit and sustained personal injuries, the extent of which are not known to these defendants; and that as a result of such injuries plaintiff was disabled for some period of time; deny each and every other allegation contained in said paragraphs.

3. Answering the allegations of paragraph X, defendants allege that they do not have knowledge or informa-

tion sufficient to form a belief as to the truth or falsity of the allegations therein contained and upon that ground deny each and every such allegation.

4. Further answering said complaint, defendants allege that if the plaintiff met with an accident and sustained injuries as alleged in his complaint, his own failure to exercise reasonable care contributed thereto and was a proximate cause thereof.

5. Further answering said complaint, defendants allege [fol. 7] that if the plaintiff met with an accident and sustained injuries as alleged in his complaint, his own failure to exercise reasonable care was the sole proximate cause thereof.

Wherefore, defendants pray that they be dismissed with their costs.

Grant H. Bagley, Dennis McCarthy, Farnsworth & Van Cott.

(Duly Verified.)

Received copy of the foregoing answer this 19th day of June, 1946.

Rawlings, Wallace & Black.

[fol. 8] In District Court of Salt Lake County

Minute Order of Trial

This case comes now on for trial, Parnell Black appearing in behalf of the plaintiff, Grant H. Bagley, and Dennis McCarthy appearing in behalf of defendants. A jury of eight (8) persons is impaneled, to-wit:

1. Maud Morgan.
2. Wm. J. Clark.
3. Laura M. Lether.
4. Jesse K. Burrows.
5. Harry L. Courtwright.
6. Louis C. Jacobsen.
7. Edwin Butterworth.
8. Leonard Hall.

Comes now Parnell Black, counsel for the plaintiff and makes his opening statement, counsel for the defendants reserving his opening statement. Whereupon the following persons are sworn and examined in behalf of the plaintiff: Gordon H. Arbogast, Clyde Wilkerson, Mrs.

Clyde Wilkerson. The depositions of *depositions of* Dr. Albert H. Good and Gordon H. Arbogast are published in open Court. Plaintiff rests. Dennis McCarthy, counsel for the defendants, makes his opening statement. Whereupon Everett William Ellege and Anders G. Johnson are sworn and examined in behalf of the defendant. This being the hour of adjournment further trial of the case is continued to Thursday, October 3, 1945 at the hour of 10 o'clock A. M.

[fol. 9] In District Court of Salt Lake County

Minute Order of Trial

The trial of this case having been continued to this time, the jury heretofore impaneled, respective counsel and all interested parties being present, further trial is resumed. Whereupon George P. Hawkins and Clyde Wilkerson are sworn and examined in behalf of the defendants. The deposition of Clyde Wilkerson is published in open Court. Documentary proof is received in evidence in behalf of the defendants. Defendants rest. Clyde Wilkerson and Gordon H. Arbogast are recalled in rebuttal in behalf of plaintiff. Plaintiff rests. Defendants rest. Both sides rest. Comes now counsel for defendants and submits a written and oral motion for a directed verdict and said motion is stated into the record. The said motion is argued to the Court by respective counsel and submitted. The Court being fully advised in the premises, it is ordered that said motion be and the same is hereby granted and the jury directed to return a verdict in favor of the defendants and against the plaintiff, and juror Edwin Butterworth, Foreman, is directed by the Court to sign the following verdict:

> "We, the Jurors impaneled in the above case, find the issues in favor of the defendants and against the plaintiff, "No Cause of Action."
>
> (Signed) Edwin Butterworth, Foreman.

October 3, 1946.

The jury is thereupon discharged from further consideration of this case and excused, subject to call.

[fol. 10] IN DISTRICT COURT OF SALT LAKE COUNTY

DEFENDANTS' MOTION FOR DIRECTED VERDICT—Filed October 3, 1946.

Come now the defendants, Wilson McCarthy and Henry Swan, Trustees of The Denver and Rio Grande Western Railroad Company, a corporation, and each of them, and move the court to instruct the jury to return a verdict in their favor and against the plaintiff of No Cause of Action. This motion is based upon the following grounds:

1. No evidence has been introduced which proves or tends to prove that the defendants or either of them were guilty of negligence in any of the particulars set forth in the plaintiff's complaint, or at all.

2. No evidence has been introduced which proves or tends to prove that the plaintiff was required in the performance of his duties as a switchman to cross over the wheel pit while the pit was open and car men were using the pit in order to repair cars; or that the defendants owed any duty to the plaintiff to provide him with a walkway or means of passing over the wheel pit while the same was open and in use by the car men.

3. No evidence has been offered or received which proves or tends to prove that the defendants should have foreseen or anticipated that the plaintiff, in the performance of his duties as a switchman, would undertake to pass over the wheel pit by means of the board while the pit was open and in use by the car men, and while the guard chains were up and in place along the sides of the pit.

4. The evidence shows conclusively that the defendants provided the plaintiff with a safe place in which to perform all of the duties required of him; that the plaintiff was not [fol. 11] required in the course of his duties to cross over the pit while the same was in use by the car men; that at the time of the accident the pit was in use by the car men and the guard chains were in place; that the guard chains operated as a warning to the plaintiff and other switchmen that the wheel pit was open and in use by the car men and that it was dangerous for switchmen to attempt to pass over the wheel pit by means of the board, or other means; that the board from which the plaintiff fell was not designed or

intended as a means of enabling switchmen to cross over the pit while the pit was open and in use by the car men.

5. The evidence shows conclusively that the plaintiff understood and appreciated the danger of attempting to cross the wheel pit while it was open and in use by the car men and understood that the guard chains were a warning to him not to attempt to cross the pit. Notwithstanding such knowledge and appreciation he undertook to cross the pit by means of the board and his own negligence in so doing was the sole proximate cause of the damage and injury of which he complains.

6. The evidence shows conclusively that the board across the wheel pit which plaintiff attempted to use was securely attached to the side walls of the pit; that it did not shift or turn when men were passing over it and was in all respects safe and secure for all use and purposes for which it was designed and intended; that the board was designed and intended for use by car men while the pit was in use by them for the purpose of repairing cars; that when the pit was not open and in use for repairing cars the top of the pit was covered by placing other boards alongside the board from which the plaintiff fell; that the board in question was in all respects secure, safe and sufficient as a crossway over the pit for plaintiff and any other employees when the top of the pit was covered by other boards and defendants were under no duty to keep the board safe or secure for use by [fol. 11] the plaintiff when the pit was open and in use by the car men.

7. No evidence has been offered or received which proves or tends to prove that the plaintiff slipped or fell from the board by reason of any oil, grease, or other slippery substance on the board, and no evidence has been offered or received which proves or tends to prove any defect or insufficiency in the board or that it was loose or insecure when the plaintiff fell from it, or at any other time.

Farnsworth & Van Cott, Grant H. Bagley, Dennis McCarthy, Attorneys for Defendants.

[fol. 13] IN THE DISTRICT COURT OF SALT LAKE COUNTY

VERDICT—Dated October 3, 1946

We, the Jurors impaneled in the above case, find the issues in favor of the defendants and against the plaintiff, "no cause of action".

Edwin Butterworth, Foreman.

Dated Oct. 3rd, 1946.

[fol. 14] IN DISTRICT COURT OF SALT LAKE COUNTY

JUDGMENT ON VERDICT—Filed October 3, 1946

This action came on regularly for trial. The said parties appeared by their attorneys. A jury of — persons was regularly impaneled and sworn to try said action. Witnesses on the part of plaintiff and defendant were sworn and examined. After hearing evidence, the argument of counsel, and instructions of the Court, the jury retired to consider of their verdict, and subsequently returned into Court, and being called, answered to their names, and say they find a verdict for the defendants and against the plaintiff

"We, the Jurors impaneled in the above case, find the issues in favor of the defendants and against the plaintiff "No cause of action."

Dated Oct. 3rd. 1946.

Signed: Edwin Butterworth, Foreman.

Wherefore, by virtue of the law and by reason of the premises aforesaid, it is ordered, adjudged and decreed that said —— have and recover from —— the sum of—— Dollars with interest thereon at the rate of — per cent per —— from the date hereof till paid, together with said —— costs and disbursements incurred in this action, amounting to the sum of —— Dollars.

Judgment entered Oct. 3rd A. D. 1946.

[fol. 15] IN DISTRICT COURT OF SALT LAKE COUNTY

NOTICE OF APPEAL—Filed November 18, 1946

To the above named defendants, and to Farnsworth & Van Cott, Grant H. Bagley, and Dennis McCarthy, their attorneys:

You and each of you will please take notice that the plaintiff in the above entitled action hereby appeals to the Supreme Court of the State of Utah from judgment rendered in said District Court on the 3d day of October, 1946, in favor of said defendants and against the plaintiff, said judgment having been made and entered on the verdict of the jury of no cause of action, which said verdict was rendered by the jury upon the order and direction of the Court.

Dated, this 18th day of November, A. D. 1946.

Rawlings, Wallace & Black, Attorneys for Plaintiff.

Service of the foregoing Notice of Appeal and a true copy thereof is hereby acknowledged this 18th day of November, A. D. 1946.

Farnsworth & Van Cott, Grant H. Bagley, Dennis McCarthy, Attorneys for Defendants.

[fol. 16] IN DISTRICT COURT OF SALT LAKE COUNTY

ORDER SETTLING BILL OF EXCEPTIONS—November 13, 1946

The Bill of Exceptions having been filed and there being no objections thereto, it is ordered that the said Bill of Exceptions be, and the same is hereby settled and approved as to all parties.

[fol. 17] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 18] In District Court of Salt Lake County

Portions of the Bill of Exceptions

Gordon H. Arbogast, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Black:

Q. Mr. Arbogast, you may state your full name and your address, please.

A. Gordon H. Arbogast, 2814 West Third Avenue, Denver, Colorado.

Q. You spell your last name A-r-b-o-g-a-s-t?

A. Yes, sir.

Q. You are acquainted with Mr. Wilkerson, are you not?

A. Yes, sir, have been for several years.

Q. And you have worked with him there in the yards at Denver for many years, have you not?

A. Yes, sir.

Q. What is the nature of your employment?

A. I'm engine-foreman at the time now, but I have switched cars there for—in the neighborhood of twenty-six years.

Q. You are acquainted with the—well, withdraw that. You are employed by the defendant in this case, the trustees of the Denver and Rio Grande Western Railroad Comapny?

A. Yes, sir.

Q. And you are acquainted with their yards, the Burnham yards in Denver, are you not?

[fol. 18a] A. Yes, sir.

Q. And has there been within these yards—you have seen the 27 years of switching service you mentioned to the jury?

A. Yes, sir.

Mr. Black: Now, your Honor, may the record show the defendant has presented for consideration of the court and jury its Exhibit 1, Defendant's Exhibit 1?

Mr. Bagley: I think it is Exhibit 2, Mr. Black.

(Discussion.)

The Court: That includes both the structure of the tracks and this pit—the wheel pit and the car on Exhibit 2?

Mr. Bagley: Yes, your Honor.

The Court: All right, it is by agreement of counsel received in evidence.

Mr. Black: It is received now in evidence?

The Court: Yes.

Q. Mr. Arbogast, have you had an opportunity to examine this miniature that is offered and received in evidence as Defendant's Exhibit 2?

[fol. 19] A. No, sir, I haven't.

Q. Will you now look it over because I desire to ask some questions about it?

Mr. McCarthy: Scale of that is one foot to a quarter of an inch.

Q. One foot to a quarter of an inch. Mr. McCarthy has advised you this is drawn to scale by the engineering department of the defendant on the scale of one foot to a quarter of an inch. I will ask you if the exhibit, Exhibit 2, appears to you to be a fair and accurate likeness of the wheel pit in the Burnham yards of the defendant at Denver and track 23½ and other tracks?

A. Yes, sir, it does.

Q. And having examined the exhibit, I will ask you to state what the switching crews use track 23½ for, generally?

A. Well, they use it for, to change wheels and jack boxes, or any repair work that requires a pit.

Q. Requires a pit?

A. Yes, sir.

Q. Do you recall approximately when the pit was established?

A. No, sir, I can't recall that, but I'd say off-hand that it has been there probably six or seven years.

Q. I call your attention to the safety chains attached to the post immediately to the west of the car that is standing on track 23½, will ask you about when those chains were placed as they appear to be on the exhibit?

A. Well, they were placed—the posts and chains were placed after the pit was in service and built for quite a while, but I don't know the exact time that the chains and posts has been placed there.

Q. But when I request you—Mr. Arbogast, what are the usual duties of a switchman engine foreman there in the yards?

A. Well, in this case it would be the duty of the engine [fol. 20] foreman to see that the pit was in shape to pull the car off—that the rails, you understand, detach and go down in or shove up—could be displaced and see that there were no blocks under the car that would cause the car to derail on the pit, and also look for bad order cars which we work, but—that is what we work—but when a car goes for the pit, we look for a bad order card, and when we go to remove the car, we have to examine the car for a bad order card, and still on there, we do not remove the car from the pit.

Q. You spoke of one thing that is of interest to me at this time, and I desire that you come down to the exhibit before the jury and explain just what the engine foreman's duties are with reference to inspection of the tracks that go across the pit. You desire to use the pointer, I now hand it to you?

A. Now, this is the pit and under here is the track that comes up under the car. You can't see it there for the wheels, but it lets down in the pit or you can shove it up, protrude up, and when an engine foreman—when the car is placed on the pit, he looks for this track to be lined up, or should look. That is his duties, and he should look for cars and also examine the wheels under the car for blocks which sometime they leave blocks under there which could cause derailment of the car.

Q. Now, this track that you have spoken of, do I understand that that track is built on a special mechanism that permits it to be lowered into the pit and raised up flush with the rails?

A. Yes, sir, it comes onto the pit on—there is a concrete wall, as you will notice here, that is built in there and it comes flush just like that. When you see that board there, when the boards are covered over, that is the way the pit is covered up. Now you see here there is the board that goes in here next to it—that's removable now.

Q. Yes?

A. And here there is a board that goes in here that can be [fol. 21] removed when the workmen are working, but there is a permanent board that—it seems to me like this board sets farther to the west than actually it should. Now, when you are walking in, here is your car and when I walk in, I catch hold with this hand, just reach over, get the post and

go through—step on the board and catch the post with my other hand and go through. That is the way I walk through it.

Q. That is when you are walking through here?

A. Yes.

Mr. McCarthy: That between the post and onto the board, then through it?

A. Yes, sir.

Q. As you are going north?

A. Yes, as you are going north, you just reach up with your hand, cut through, reach up and put other hand on the board, and step around it. It isn't a great deal of trouble, and here if you—now, the pit runs crosswise like that, as you see here the east, and you would have to walk all the way around the pit, you understand, and poor old switchman that is working there is plenty tired, he don't feel like making lot of extra steps.

Q. You may take the witness stand, Mr. Arbogast, got little ahead of my story. Now, Mr. Arbogast, what is the condition—the usual condition of the pit when the men are not working in repairing wheels and jack boxes, and things of that kind?

A. It's covered with those boards. There is boards fits into cover the entire pit, and the posts and chains are released, they pull it up out the hole and set back out of the way between tracks 4 and 23½.

Q. In other words, when the men are not working in the pit, the post to which the chain is attached is left out of the hole?

[fol. 22] A. Yes, sir.

Q. On each side?

A. And laid back in that position where you see there between the tracks.

Q. By the way, identifying tracks, now, will you tell the jury what is the number of the track at the extreme west here?

A. That is 24 track.

Q. And the next track?

A. 23½.

Q. Is this that I am speaking—now, start over again. What is the number of the track that the——

A. 23½, Mr.——

Q. All right, the track next to the, to the west?
A. Well, I would call that there west of the wheel pit.

Mr. McCarthy: We will agree it is called "wheel track."

A. Sir?
Q. The wheel track?
A. Why, 24 doesn't penetrate the pit at all.
Q. The track on the east here at the extreme west is 24?
A. Yes, sir.
Q. The track next to it is the wheel pit track?
A. Yes, sir.
Q. And the track upon which the car is standing is track 23½?
A. 23½, yes, sir.
Q. Track over to extreme east?
A. I always call it the west and the east wheel pit as I stated before—to these gentlemen.
Q. Let's agree on that, Mr.——

Mr. McCarthy: Let's call that track 24.

Q. You mean clear over to the east?

[fol. 23] A. No, don't call track——

The Court: Off the record, Miss Reporter.

(Discussion.)

Mr. Black: I want the record straight, your Honor. I go now through it: The track on the extreme west is track 24, the track immediately to the east of it is the wheel pit track. The track next to the—upon which the car is standing is track 23½, and the track over to the extreme east is track 23.
Mr. McCarthy: Correct.
Mr. Black: All right.

Q. Now, Mr. Arbogast, when the workmen are not working in the pit, then, the posts are removed from the holes and placed over to the west of the permanent posts?
A. Yes, sir, laid down out of the way.
Q. Between tracks 24 and the wheel pit track?
A. Yes, sir, in that vicinity.
Q. And then the wheel pit then is covered, the top of it is covered with boards that go across?
A. Yes, sir.

Q. Mr. Arbogast, since the chains and the posts were installed there at the wheel pit, what if anything have you noticed with respect to the practice of men passing between cars standing on 23½ and the posts to which the safety chains are attached?

Mr. McCarthy: I object to that question, your Honor, on the ground Mr. Black is assuming something, conclusion which is not yet in evidence when he refers to a "practice".

Q. To satisfy the objection, I will—Mr. Arbogast, I want you to answer this question yes or no: have you noticed any particular practice and observed any particular practice with reference to switchmen and workmen passing between the safety posts when they are in place, and I refer to the posts immediately to the west of standing cars, and the standing cars, since these posts and safety chains were set up?

[fol. 24] A. Yes, sir.

Mr. McCarthy: Object to that——

A. I have.

Mr. McCarthy: —question on the same ground, on the ground still leading, substantially the same question.

The Court: Objection overruled; if you would like to ask him any questions on voir dire as to the extent of his knowledge of such things or consideration of it, you may, but he has answered that question, "yes".

Mr. Black: Said he had observed a practice.

The Court: It may stand in the record.

Q. And what have you noticed with reference to the practice of men passing between the standing cars on 23½ and the posts that hold the safety chains?

A. Well, they would walk through and get on the board and walk to and from each side, and the men that work on the pit work on that board, and sometimes set on the board next to the—in next to the car there to perform their work, you know, like where they are up under, or working on the car, they use the board over from it to work on.

Q. Were you working there in the yards when these posts, safety chains, were installed?

A. Yes, sir, I was, I must have been.

Q. Have you worked there since that time continuously?

A. Yes, sir.

Q. What has been your practice in passing between cars that are standing on 23½ and the posts that hold the stakes and chains when they have been in place?

A. When I have occasion to pass through there, I put my hand on the post, step over on the board, and go around the other post, and that is the way I pass to and from on [fol. 25] the pit.

Q. Have you observed other men passing over the pit under similar circumstances?

A. Yes, sir, I have.

Q. And what can you say with reference to the—such occurrences, as to how often they happen?

A. O, I would judge that I saw the men pass through there dozens of times. I worked there and I go to work at three o'clock, and the men doesn't quit until four, and the pullman company, they have their work done on that pit, the Rio Grande Company does their work there nearly all the time. All through the war, they were fixing cars and I go to work and I am the only engine—that is my regular work, the coach yard engine, and I would always do that particular work. You know, what was to do after three o'clock, and it would—you know men work with you, you would see them walking numerous times, numbers of times, you know.

Mr. Black: You may cross-examine.

Cross-examination.

By Mr. McCarthy:

Q. Mr. Arbogast, you stated that you've been employed in the yards, did you not, for a number of years?

A. Yes, sir.

Q. How many years would you say?

A. I have been working there going on 26 years; that is my seniority that I hold there.

Q. And how long in the yards at Burnham?

A. Oh, I have been there in the Burnham yards practically all my work probably I have did, helping and working that engine crew. I wouldn't state this for sure, but I expect it would amount to sixteen or seventeen years altogether [fol. 26] with my helping and foreman on the engine.

Q. And of course you have brought cars in there and put them over the—spotted them over the wheel pit?

A. In fact, I do it every day.

Q. And——

A. If there is anything at all.

Q. You know when you bring a car in there, that it is a bad order car when you bring it in, do you not?

A. Yes, sir.

Q. Wouldn't come there unless it was a bad order car, is that correct?

A. Well, that—could be that it would be put in there if it wasn't bad order. They put them in there to examine the boxes and the wheels.

Q. That is the purpose——

A. The purpose of it is to see if it is bad order and also fix bad orders.

Q. And now you say that—what shift is it you work?

A. I work from three to eleven.

Q. From three to eleven?

A. Three P. M. tell eleven P. M.

Q. And Mr. Wilkerson, what shift is it he works?

A. He works now, I think he is working seven A. M. till three P. M.

Q. Now, on the shift that you work from three until eleven, I believe that you stated that on that shift the regular car men are usually through with their work, are they not?

A. Well, they are working on the pit lots of days.

Q. Can't you just answer my question: on your shift, isn't it true that the regular car men are usually through with their work?

[fol. 27] A. I go to work at three o'clock and get over there, and they work one hour; they have one hour to work.

Q. Regular car men usually work from seven until three, or seven until four?

A. Four, yes, sir.

Q. And you work from three till eleven, so there is an overlap of one hour?

A. One hour, yes, sir.

Q. But, ordinarily, at four o'clock, the regular car men are through with their work, isn't that correct?

A. That's correct.

Q. And ordinarily when the regular car men are through with their work, the chains—safety chains—are removed

from the pit and the pit cover boards will be entirely over the pit?

A. That's correct.

Q. That is correct; and so that during most of the time that you are on duty from three until eleven, the safety posts are down, the safety chains are down, and the pit is completely covered up, and of course people go back and forth on these boards over the pit, which is completely covered, is that correct?

A. No, sir, that isn't exactly correct.

Q. During most of the time when you are on shift, that is the situation?

A. Please let me tell you how I work. I go to work and the day shift or maybe some extra engine leaves cars on the pit to be completed. All right, I go over each and every day to see and examine to see if the cars are completed and nearly every day I get cars off those pits.

[fol. 28] Q. Now, just a moment, just answer my questions.

A. All right, sir.

Q. You are on the shift from three to eleven?

A. Yes, sir.

Q. And you just stated that during most of that time, the cover boards are on the pit, and the safety chain posts are removed, isn't that correct?

A. When there is no one working there.

Q. Yes; there is, of course, emergency work that is occasionally done there, but during most of the time that you are on shift, the cover boards are on the pit and the safety chain posts are removed and safety chains are removed; isn't that correct?

A. I would say it might take the majority of the time I am on duty.

Q. Most of the time?

A. But—that they are down. There has to be——

Q. Of course, during that time it is perfectly proper for people to go across the cover boards all the time—right?

A. You don't have the pit covered all the time, Mr.——

Q. When men are not working on the pit?

A. That's right, yes, sir.

Q. Then the pit is covered?

A. Yes, sir.

Q. And the safety chain posts are removed?

A. Yes, sir.

Q. Then of course people go back and forth on the boards all the time over the pit; that is true, isn't it?

A. Well, it is necessary to go across—they would go backwards and forward when the pits is closed.

Q. It is perfectly safe, perfectly proper?

[fol. 29] A. Yes, sir.

Q. And there are no chains up there at all?

A. I don't say there isn't any chains up; they should be removed when laid down.

Q. That is usually the situation, is it not?

A. Yes, sir.

Q. So that, your testimony as to the numerous occasions when men—you have seen men squeeze around the ends of the chains and over the cover board, then squeeze around the end of the other post and over the pit, your testimony is subject to the limitation you have just stated, is it not, that during most of the time that you are on duty, that the pit is covered, covered up with the cover boards and the chains are removed, subject to that limitation, is it not?

A. Well, I'd say that if the pit was uncovered, the actual 24 hours, you would only have a couple——

Q. Just a minute, I asked you if your testimony as to the times that people have gone over there wasn't subject to the limitation you have just admitted that it—during most of the time when you are on duty, the cover boards are on the pit, and the chains are down; now, can't you answer that?

A. Yes, sir, that would apply to the three o'clock shift. It would be the most of the period.

Q. So that your testimony as to these occasions would be subject to that limitation, isn't that right?

A. Well, I guess so, at that.

Q. And now you stated, I believe, that the wheel pit was installed several years ago at the time the yards were made, and that thereafter the safety chain posts were put up?

A. Yes, sir.

[fol. 30] Q. You didn't recall when that—those chain posts were put up, but would it be an unfair estimate that these chain posts were installed around the first part of May, 1945?

A. Well, sir, I wouldn't say; I couldn't say because, as I stated before——

Q. You don't dispute that that might be the fact?
A. It could be the fact, yet, sir.
Q. So that if that is the fact, which of course will be——

Mr. Black: We will stipulate, Mr. McCarthy, you state in the record what the fact is, we will stipulate that that is the fact.

Mr. McCarthy: I understand it is, but I would rather wait for my witnesses to make the statement.

Q. If it is true that these safety chain posts were installed the first part of May, 1945, then your testimony regarding these occasions when men went across the pit when the chains were up and the cover boards were off, would also be subject to that limitation, would it not?
A. It certainly would, yes, sir.
Q. You didn't refer to any occasions when the chains were not up and a car wasn't on 23½ and the boards were not off?
A. Yes, sir, I did refer to—before the boards were put up, we walked the board on the pit just the same as we did.
Q. You mean before the chains were put up?
A. Before the chains, yes, sir, were put up to the pit.
Q. Before the chains were put up and when the pit was open, you walked just the same as you do now?
A. Yes, sir.
Q. And since the safety chain posts have been installed and the safety chains have been put around three sides of [fol. 31] the pit, you do just the same as you always did?
A. Still, yes, sir; if I have the occasion, that is the way I cross through there on the board.
Q. So that some of the occasions that you refer to were occasions that occurred before the safety chain posts were installed?
A. Yes, sir, it would naturally be that way, because, as I stated to you, I have worked there on the pit all these years, you know, did the coach work, and I would see the men working to and from the pit and lots of times I have occasion to go to the pit to look for a car, when I would move anything off the pit.
Q. So that your testimony, also, is subject to another limitation, namely, that some of these occasions you refer to occurred before safety chains were installed?
A. Yes, sir.

Q. Around the pit. Now, Mr. Arbogast, on the occasions that you have gone between the car standing on 23½——

A. Yes, sir.

Q. — and the safety chain post, was it necessary when you did go in between that space—rather a narrow space there, is it not?

A. Yes, sir, it isn't a large——

Q. You couldn't walk straight ahead; it was necessary for you to turn sideways, was it not?

A. That's right.

Q. And not only turn sideways, but to squirm between posts and the car, is that correct?

A. No, sir, you do not have to squirm.

Q. Well, would you say a correct word would be "crawl"?

A. No, sir, the correctness of that wouldn't be "crawl".

[fol. 32] Q. Do you recall at the time that you gave your deposition under oath in Denver, Mr. Arbogast?

A. Yes, sir.

Q. And on page 24 and 25 of that deposition—on Page 24, I asked you this question, referring to this same opening——

A. Yes, sir.

Q. "Can you estimate it?"

Mr. Black: Which page now?

Q. Page 24, the last question on the page: "Question," that is referring to the distance between the post and the car, "Can you estimate it?"

A. I stated——

Q. Now, just a moment, you answered, "Well, you have got to crawl through there now. I will leave that to your judgment." Did you so state?

A. Well, I might have made that assertion in the way—in this way——

Q. Just a minute, did you make the assertion in Denver at the time this deposition was taken?

A. I might have made that statement, yes, sir.

Q. Was it true?

A. Well, it was according to how you determine it, whether you would crawl, but I demonstrated to you at the time I made that assertion how I passed through the cavity.

Q. But you did make the statement, "crawl through there"?

A. I might have said "crawl." You can define a crawl if you care to.

Q. Can we use the word "crawl"?

A. You can define it that way if you care.

Q. You defined it that way. I am just referring to that. Then you crawl through there, and you were turned sideways.

A. Would you care for me to come down demonstrate to you?

[fol. 33] Q. No, just stay there; I will ask you the questions. You were turning sideways, and then you sort of pivot around the post; you are facing the post, are you not?

A. Yes, sir, I wouldn't—I don't know what you determine that, but I wouldn't say "pivot," I would say "slide" through.

Q. All right, "slide through," we will say. Now, does this model of the wheel pit show the approximate position that this cover board—so-called "stationary cover board," is usually located with reference to the chain posts?

A. Yes, sir, I would say it was something near.

Q. That is a fair representation?

A. A fair demonstration of it.

Q. That cover board, of course, is west of these chain posts. Now, would you turn with your—in going in, after you get through the space between the car and the post, would you turn your back to the chain in going westward, or would you still be facing the chain in going through there on these occasions?

A. Well, you would be facing south if you entered from the north.

Q. I see; so would your back be to the chain as you go from this distance?

A. No, sir.

Q. From east to west, before you get to the place where the cover board is and you can cross the pit, in going in, would your back be to the chain?

A. When you are walking across the cover board, if entered to the north, it naturally would be the back.

Q. You are facing the post, then you turn with your back to the chain, then you would have to take a few steps?

A. Your back is to the car as you slide through.

Q. Your back is to the car?

[fol. 34] A. Yes, sir.

Q. Then from going from this chain to the board, is your back to the chain or the front of your body?

A. You would pass by the post as you walked across, if you entered from the north, your back would be naturally to the chain, as you walk south over the board.

Q. You would be walking sideways for a few steps, is that correct?

A. Oh, you might make one step sideways.

Q. One step sideways to the west; then across the floor, how many steps did you usually take to walk across the board?

A. I wouldn't have no idea, sir.

Q. Then you catch the post on the other side?

A. As you step off, yes, sir.

Q. And you go through the other side the same way you went through the first place?

A. Yes, sir; as I recall it, that is the way you would step off.

Q. Now in addition to being an employee of the Rio Grande Railroad, you are also chairman of the Switchman's Union of North America, are you not?

A. Yes, sir, I am local representative.

Q. Local chairman?

A. Yes, sir, in Denver.

Q. And you represented Wilkerson in the investigation in this case?

A. Yes, sir.

Q. And do you still represent him?

Mr. Black: According to what you mean by "representing" him, your Honor. Not one of his counsellors before this court and jury.

Mr. McCarthy: I will withdraw the question.

Q. You knew Wilkerson, you said, for a number of years; [fol. 35] about how many years?

A. Well, I have known him best part of the years I have worked there.

Q. About 25 years?

A. Yes, sir, something like that—twenty or twenty-five.

Q. You are acquainted with Mr. Wilkerson's wife?

A. Yes, sir, I know her as well as I know any of the employees' wives.

Q. But you are acquainted with her?

A. Yes, sir.

Q. And you have talked to Mr. Wilkerson a great deal about this case?

A. Not a great deal; I have discussed the case at several times with him, yes, sir.

Q. And there is one other point I wanted to ask you, Mr. Arbogast; when a car is brought in on the wheel pit, there is a blue flag ordinarily set out on that track, is there not?

A. Yes, sir.

Q. And what is the significance of that blue flag in railroad parlance?

A. Well, the flag has to be removed before you can couple the engine onto the car that's on the pit. That is what a blue flag is for is to——

Q. And if a car is brought in on the wheel track, or track 23½, where would the blue flag ordinarily be placed?

A. It would be placed to the south as it is a dead-end track to the north.

Q. This is a dead-end track here, here on this end, the north end?

A. Yes, sir, up next to the commissary, it is dead.

Q. So there would be just to the south of the car on track 23½; and who places that blue flag out there?

[fol. 36] A. I couldn't say as to that, but it's the car men's duties——

Q. Car men that are working on the car and on the pit?

A. That's right; the men that puts up the flag shuld remove it, but at all times that doesn't apply.

Q. Does anyone else have any authority to move that blue flag, other than the men that are on the pit that are working on the car?

A. No, sir, I would say they haven't.

Q. As a matter of fact, it is an inviolable practice in railroad yards, is it not, that only the men that put up the blue flag in situations of this kind would take the blue flag down?

A. I think that's right.

Q. Is that correct? Say "yes" or "no" so the stenographer can put it in the record.

A. I think that is correct.

Q. And when they are beginning work on a car, why they put the blue flag out, isn't that correct?

A. Yes, sir.

Q. And when they are through work on a car, they remove the blue flag, do they not?

A. They should, yes, sir.

Q. And when that blue flag is removed, then it is notification to anyone who may be concerned that the car—they are through with the car and the car is ready to be moved; isn't that the situation?

A. No, sir, that isn't. The situation is just this: that when the blue flag is removed, then the engine that's waiting for the blue flag to be moved, may proceed after moving the blue flag and make the coupling and move the car.

[fol. 37] Q. But it is the signal to that engine that the work is done on the car, is it not?

A. I didn't understand.

Q. It is a signal to that engine——

The Court: Removal of the flag?

Q. The removal of the flag is a signal to that engine that the work is done on the car, is it not?

A. Yes, sir, it would indicate——

Q. And that they can come in on the track and get the car?

A. Yes, sir.

Mr. McCarthy: I think that's all.

Redirect examination.

By Mr. Black:

Q. Mr. Arbogast, when these chains are up, how is the pit usually covered, having in mind the chains are up and there is a car on the track?

A. It is covered different ways, Mr. Black, it is according to where the men would be working on the car that the openings would be on the pit. You see the circumstances would govern there. It wouldn't be the same way at all times, I wouldn't think.

Q. Then the pit is open, but covered to accommodate the work that is being carried on?

A. Yes, sir.

Q. Now, when the chains are up and the car is standing on the track, is the board immediately adjacent to the west rail always in place and crosses over the pit?

A. Well, I couldn't say; it doesn't have to be, Mr. Black. They can remove it or they can leave it. I have saw them sitting there on that board—it seems to me like I have noticed that a number of times, the workmen are using the [fol. 38] board to work on.

Mr. McCarthy: What board are you referring to?

Mr. Black: Board immediately adjacent to the rail.

Q. When there is a car standing on 23½ and chains are up, you may state whether or not there is usually a board across the pit immediately to the west of the posts?

A. Yes, sir, the board sets just to the west of the post.

Q. Is that usually there, you say?

A. Yes, that there is—now, I have always found it there, and I have had some of the men on the pit say that it wasn't——

Mr. McCarthy: We object.

Q. What they would say to you would be hearsay here and immaterial.

A. Well, I have always found the board there, so you could walk across the pit.

Q. Do you know of any use that is made of that board except for men to cross over the pit on?

A. No, sir, I don't know——

Mr. McCarthy: He has already testified the use of it.

Q. Mr. Arbogast, you wanted to come down and demonstrate to the jury how you passed between the car and the post. Now, will you come down and do the best you can, make a demonstration as to how you usually pass between the car and the post when the post is there and the chains are up. Go through from north to the south.

(Witness steps in front of the jury box.)

A. I walk in the—alongside the car, put that hand on the post, step on the board.

Q. You say "that hand"?

[fol. 39] The Court: Right hand on the post.

Q. That's right.

A. Yes, just put my hand on the post.

Q. Which hand?

A. I walk up, then catch the post like that.

Q. With which hand?

A. With my right hand.

Q. Mr. Arbogast, I want to explain to you we are making a record over here. When you say "that hand," could either be right or left, so as you make this description, you name the hand so get in the record.

A. I take my right hand and walk up to the post, catch on top, slide through, step on the board, slide through one side, then when come back, it is same performance, only posts is on the other side, on the left hand.

Q. I see; you may take the stand. Now, in using the word, "crawl," did you intend to indicate that you crawl down on your hands and knees, crawl like a child would crawl?

A. No, sir, I didn't; I didn't.

Q. Didn't do that. Your attention was called to a part of the answer that was given; I will ask you to state whether or not the complete answer that you gave in the deposition was as follows: I — now starting with the question at Page 24 and will complete answer on page 25 of the deposition:

"Q. Can you estimate it?

"A. Well, you have got to crawl through now, and I will leave that to your judgment. You got to cross through there and hold onto the post and walk around and step on the board and step out and catch the post on the other side. I would say probably there is twelve or fifteen inches there. Now, you mean, do you, from the bottom of the pit to the car"

[fol. 40] Was that your answer as near as you can recall?

A. Well, I——

Q. No, no, I mean was that the answer you gave in the deposition as near as you now recall?

A. Yes, sir.

Q. Your attention was called to the blue flag rule on cross-examination; I will ask you to state whether or not a switchman has any duties to perform with reference to cars that are standing on 23½ over the pit, even though there might be a blue flag displayed at either end of the car?

A. No, sir, he has no jurisdiction or nothing whatsoever to do with blue flags, Mr.——

Q. He wouldn't have any jurisdiction of the blue flag, would he, for any duties to perform in the vicinity of the car?

Mr. Bagley: Object to it, your Honor, on the ground he has already answered the question, that it is repetitious.

The Court: I don't recall that, maybe it is repetitious, Mr. Bagley, but I think let him answer the question.

Q. Would the switchman have any duties to perform as switch foreman?

A. Yes, sir, he could have—you know, he could go down to see if they were, you know working on the car, how near through they was. If it was an emergency car they wanted to use, it would be very natural he could step down there and inquire about the car before the blue-flag—that would have no effect whatsoever on the foreman; that applies to the engine.

Mr. Black: That's all, you may cross-examine.

Recross-examination.

By Mr. McCarthy:

Q. Just a moment ago when Mr. Black first asked you that question, Mr. — your answer was "no," was it not?

[fol. 41] A. To what? I don't know what question you are referring to.

Mr. McCarthy: Will the reporter please read the question Mr. Black first asked to which objection was made? Will you read it, Miss Reporter?

(Reporter reads from the record.)

Q. The first time that question was read to you, your answer was "no," was it not?

A. Well, could I please——

Q. Just answer my question; the first——

A. I do not know, sir.

Q. You don't know whether your first answer was "no," or not?

A. I do not know, sir, whether my first answer was "no."

Mr. McCarthy: I think that's all.

CLYDE WILKERSON, the plaintiff herein, called as a witness to testify in his own behalf, being first duly sworn, testified as follows:

Direct examination.

By Mr. Black:

Q. Mr. Wilkerson, you may state your full name, please.
A. Clyde Wilkerson.
Q. Now, Mr. Wilkerson, I want you to speak so all the ladies and gentlemen in the box can hear everything you say. You take care of that?
A. Yes, sir.
Q. Where do you live?
A. 3635 West Tenth Avenue, Denver, Colorado.
Q. And how old are you at this time, Mr.——
A. 61.
Q. At the time you were injured, how old were you?
A. 60.
[fol. 42] Q. You are presently employed by the defendants in this case, are you not?
A. Yes, sir.
Q. As a switchman in yard service in Denver?
A. Yes, sir.
Q. How long have you worked for the company?
A. 12th day of this month will make me even thirty years.
Q. That is, you had experience in train service, yard service, before that?
A. Yes, sir.
Q. How long?
A. About eight years previous to the—six to eight years.
Q. Where did you work?
A. Santa Fe, Union Pacific, Colorado Midland.
Q. You spent your lifetime—your mature lifetime—in railroad service?
A. Yes, sir.
Q. I call your attention to the 26th day of July, 1945, will ask you if you were working at your job on that day?
A. I was.
Q. And what job were you holding at that time?
A. Engine foreman.
Q. I want you to tell the jury what the duties of the engine foreman are.

A. Have charge of the crew that is doing the work that is assigned to that engine at the present time.

Q. Now, tell the jury how many men were in your crew that day, and what each of them were doing.

A. I have two helpers with me and an engineer and fireman on the engine consisting of five-man crew.

[fol. 43] Q. And, in a general way, what was the nature of the work you were doing in the yards at Denver that day?

A. General passenger switching.

Q. You were in the coach yard, were you?

A. Yes, sir, making up passenger train, doing general passenger work.

Q. Your shift was from the beginning time of what, seven in the morning?

A. Seven A. M. to three P. M.

Q. How long had you been holding down that day shift?

A. About something like six years.

Q. Your seniority was sufficient so you could hold the day shift?

A. Yes, sir.

Q. During that six years, had you worked in the coach yards in Denver?

A. Practically every day.

Q. I understand the wheel pit that has been spoken of in the court this morning is in the coach yard at Denver?

A. Yes, sir.

Q. By the way, I don't believe you have fully described to the jury what the duties of the engine foreman consist of; just what are you required to do in your job as engine foreman?

A. I am giving instructions what work they want done, and I have to go and see that the work is arranged so that I can get to it to do it.

Q. Is the engine crew work under your direction?

A. Yes, sir.

Q. And the other members of your crew likewise, I suppose?

[fol. 44] A. Yes, sir.

Q. Now, Mr. Wilkerson, I take it that you have examined Exhibit 2, have you not?

A. I looked at it for a couple of minutes, yes, sir.

Q. Would you say that it contains an accurate reproduction, miniature reproduction, of the wheel pit and the tracks that are used there?

A. Yes, sir, to a certain extent.

Q. Well, to what extent would you take exception with the accuracy of the reproduction, if any?

A. The pit where those two bottom rails are that the jack runs on in the bottom of the pit between your two rails is something like three feet deeper than those two rails there.

Q. In other words, the two rails are two rails that appear here in the bottom of the pit?

A. Yes, sir.

Q. You say your best judgment from the top of the rail to the——

A. Top of that rail down to the bottom of the pit, I should judge, is about three feet.

Q. I want you to tell the jury, if you know, as near as you can, how that jack operates that runs the rails in the bottom of the pit.

A. It is operated by—raised up and down by compressed air. It is operated on the rail sideways by electric motor.

Q. That is, if it moves to the east or the west along the rails, the power is furnished by electric motor?

A. Yes, sir.

Q. But the lifting motion——

A. Yes, sir.

[fol. 45] Q. —is furnished by the power of compressed air, is that right?

A. Yes, sir, hydraulic jack.

Q. Hydraulic jack. Now, Mr. Wilkerson, I will ask you to describe, if you will, for the jury, how the tracks that cross the pit underneath—that is, at 23½—how are they handled, those tracks that are just immediately over the pit?

A. Well, it's a short piece of rail on each side made into a square, so that it will stay at a certain gauge at all times, and, when the jack comes up under it, it lifts that up enough so as to take the weight of the wheel and the rail; then they release the rails on each end, on each side, then lower the jack wheel and all into the pit so it can be moved to the sideways to be taken from the pit.

Q. So, then, the wheels are lowered into the pit by the manipulation of that track, is that right?

A. Yes, sir.

Q. I take it you never worked as a railroad repairman in the yards, Mr.——

A. No, sir.

Q. From the testimony, I assume you were working in the yards when these—this wheel pit was constructed?

A. Yes, sir.

Q. Can you tell the jury, and I suppose they can figure it out—may get the evidence later—approximately how wide that is from side to side, this wheel pit is?

A. Oh, I would say it is nearly four feet. I don't know the exact measurement.

Q. Nearly four feet wide?

A. Yes, sir.

Q. About how deep is it?

[fol. 46] A. I was told it is eleven foot, four inches to the top of the jack rail in the bottom.

Q. Would that be eleven feet from the top of the rail or eleven feet from the bottom of the pit?

A. Eleven feet from the top of the pit to the top of the pit that the jack rail operates on.

Q. From there to the bottom of the pit, you say, is about three feet?

A. Three or three and a half feet, something like that.

Q. The side walls of the pit, I understand, are cement?

A. Concrete wall.

Q. The bottom, down below the jack rail, that is cement, too, I assume?

A. Yes, sir.

Q. Now, Mr. Wilkerson, I now call your attention to the time that you went to work here in the morning that you were injured, will ask you if at that time you received any direction with reference to placing any car over the wheel pit on track 23½?

A. I did.

Q. Will you tell the jury what directions you received and from whom?

A. I was instructed to spot a car on 23½, to change out a pair of wheels and the south truck of the wheel was marked.

Q. Did you comply with that instruction?

A. I did.

Q. What kind of car was it?

A. It was a tourist car, if I remember correctly, tourist sleeper.

Q. Tourist sleeper?

A. Yes, sir.

[fol. 47] Q. Would that be similar to the car, the likeness of which appears here in the miniature?

A. Yes, sir.

Q. Which trucks did you place over the wheel pit?

A. South truck, and I was under the impression, as I spotted the inside pair of wheels, I am not——

Q. Tell the jury—come down tell the jury what you mean by "inside pair of wheels," what you mean by "trucks." Take this and show on miniature if you can so understand this. First describe the trucks to them, and tell what you mean by the inside and outside trucks.

A. The truck here has three pair of wheels and each wheel operates separately. This is what we call the inside pair, or the pair next to the center. Center wheel in the truck is as that car is spotted there at the present time, outside pair of wheels would be the outside pair of wheels in that particular truck on that end of the car.

Q. Well, then, so that we will see if I understand it. Then the inside trucks, inside pair of wheels of the front trucks would be the wheels near to the center of the car?

A. Yes, sir.

Q. Now, the center trucks would be the pair between the inside and the outside?

A. Center wheels.

Q. Center wheel would be between——

A. Would be the center wheel of that particular truck on that——

Q. Then, of course, the outside would be the one near the front part of the car?

A. Yes, sir.

Q. Now, what was your memory with respect to the wheel that you placed over the wheel pit?

[fol. 48] A. I was under the impression that I spotted what we call inside pair of wheels of that particular truck; now, I wouldn't swear to that being exactly correct. I may be wrong.

Q. Now, will you tell the jury again which pair of wheels now appear over the wheel pit?

A. The center wheel of that particular truck is spotted over the pit at the present time in that miniature.

Q. So that if they wanted to remove that center wheel, then, by this jack that works on the track, that jack had come up against the wheel when the wheel was taken off, it would

be lower so that the wheel could be dropped to the bottom of the pit?

A. That's right.

Q. So taken to the shop wherever it was to be taken for repair or removal, whatever it was?

A. Yes, sir.

Q. But your memory now was that the inside wheel was the one you placed over the pit?

A. Yes, I might be wrong on that particular point.

Q. You may take the stand. Will you tell the jury about when it is that you spotted this car over the wheel pit?

A. Something like seven-thirty or eight o'clock, A.M.

Q. Was that the only car there was on 23½ at that time?

A. Yes, sir.

Q. The repair crew car men, were they there at work at that time?

A. Yes, sir.

Q. The crew had already arrived?

A. They were—when I spotted the car, they were on top.

Q. All on top?

A. Yes, sir.

Q. At that time, did you notice the condition of the safety chains?

[fol. 49] A. Yes, sir.

Q. Tell the jury about that; what you observed?

A. They were up.

Q. Safety chains were up?

A. Yes, sir.

Q. What, if anything, did you notice with reference to the covering of the wheel pit west of the car?

A. Well, the covering was all off except one board.

Q. And where was that board with reference to the posts that end—would be the post from the east end there, the east post?

A. Right next to the post with the east edge of the board.

Q. That is, the east edge of the board was up pretty close to the post?

A. Yes, sir.

Q. Then the board would be to the west of the post?

A. Yes, sir.

Q. You may state whether or not at that time you had occasion to pass over the wheel pit—I mean, after the car was spotted?

A. Yes, sir, I did.

Q. Tell the jury about that.

A. I went around the end of the car, and went across behind this chain across this board behind the other post and on over to the steam crossing on the coach yard.

Q. Now, come down to the exhibit and take the pointer and just point out to the jury the route that you took at that time.

A. Well, I spotted the car; I was on the east side of the car giving the signal to the engineer for the exact spot. After cutting away, I told my man following the engine where to come to with the engine over in the other yard. [fol. 50] I went around the end of this car.

Q. Which end, south end?

A. South end, and in between the car and the safety post across this board between the car and the other safety post and on across towards what we call the "steam crossing" in the coach yard.

Q. You were travelling, then, generally north, as I understand the demonstration?

A. That's right.

Q. You passed between the south safety post first?

A. Yes, sir.

Q. Across the board, then, between the car and the safety chain?

A. Yes, sir.

Q. Mr. Wilkerson, I will ask you to state whether or not you have ever observed other switchmen or workmen working in the yards there in passing over that pit while cars were standing on 23½ since the safety chains were up?

A. Yes, sir, I have.

Q. What has that practice been, the practice of crossing over the pit?

A. Men that work around there, regardless of whether switchmen or car men that wanted to go that way went through there.

Q. Went through—you mean over the pit?

A. Over that pit, as I just described, from either side.

Q. Do you recall—and I am not speaking of a definite time or dates—do you recall when the safety chains were installed there and the posts?

A. No, sir, I can't recall just when they were installed, [fol. 51] but they were something like six or eight months previous to this accident.

Q. But I mean, not requiring definite answer as to time, you do recall when they were installed?

A. Yes, sir.

Q. I will ask you to state whether or not you observed any practice with reference to crossing over the pit when men were working on the cars there in the daytime before these chains were installed?

A. Walked right straight across the board.

Q. Was there a board usually there to walk over?

A. Yes, sir.

Q. Was there any change in that practice after the chains were installed?

A. None, only they had to walk around the chains.

Q. At any time while you were working in the yards there before you were injured, did you ever receive any instructions from anyone forbidding you to cross over the pit?

A. No, sir.

Q. You may state whether or not you observed men cross over the pit as you have indicated here on more than incidental occasions.

A. Yes, sir.

Q. What did you observe with reference to the number of times the occasions when men would cross over the pit.

A. Oh, I couldn't say; I suppose maybe a hundred times; varies, men, both switchmen and car men or others working there in the yard necessary, pullman, employees and so forth.

Q. Crossed over the pit?

A. Yes, sir, it was a common practice for everybody to use that that way.

Q. Mr. Wilkerson, I again direct your attention to the [fol. 52] time there after the time when the safety chains were installed, will ask you if you ever saw a time or ever remember making any observation of an occasion when the chains were up and men were working, when there wasn't a board over the pit near to and perhaps slightly to the west of the posts?

A. I don't remember whether I ever noticed that for sure or not, Mr. Black.

Q. Well, did you—was the board usually there?

A. Most generally there, yes, sir.

Q. What use of that board did you observe being made?

A. Just to walk across.

Q. Did you ever see—did you ever notice the board ever being used for any other purpose except men walking across?

A. No, sir, I haven't.

Q. Ask you to state whether or not you experience any difficulty in passing between the car and the post and onto the board and over the board and between the car and the north post at the time you passed it, the first time in the morning?

A. No.

Q. When you first crossed over that board on the morning of July the 26th, day you were hurt, did you make any observations of the condition of the board?

A. I did.

Q. What did you see?

A. I saw grease on the board at that time.

Q. Was grease on the board at that time?

A. Yes, sir.

Q. Tell the jury, if you will please, about how wide that board was.

A. Well, it's something like 18 or 20 inches wide.

[fol. 53] Q. Never had occasion to measure it?

A. I never measured it at all, no, sir.

Q. Eighteen or twenty inches wide?

A. Yes, sir.

Q. Now, Mr. Wilkerson, I will ask you to state whether or not you had occasion to pass over the board again that morning before you were hurt?

A. Not until I was—at the time I was hurt.

Q. Not until the time you were hurt?

A. No, sir.

Q. I want you now to tell the jury in your own words just exactly what you were doing there at the time that you were injured; where had you been and what had been the nature of the work immediately before you were hurt?

A. We were working in the south end of the coach yard and shoved in on track 24 and spotted two private cars, if I remember correctly, to the steam plug at the steam crossing, and I give the—instructed my helper to cut the engine off and back the engine away about a car length or car and a half or two cars away from this car, so that the blue flag—could erect his blue flag for protection of the other employees on the track; then I went to what we call the battery house——

Q. Will you stop there just a minute and will you kindly come over here to Exhibit 1?

Mr. McCarthy: I think we have marked that exhibit——

Mr. Black: I might make a preliminary statement; the map has been, or will be, marked, I guess, Defendant's Exhibit 1, furnished by the defendant.

Mr. McCarthy: Yes, that last part of your statement is correct, but I think we already had a Defendant's Exhibit 1, consisting of a photograph at the time you took the deposition. I think—let's call it three, Defendant's Exhibit 3.

[fol. 54] The Court: All right.

Mr. Black: Having in mind, if the Court please, that the map will be marked as Exhibit 3 and the statement that was prepared by the engineering department of the defendant brought here for purposes of this trial, we now offer in evidence——

Mr. McCarthy: No objection.

The Court: All right, it may be received.

By Mr. Black:

Q. Mr. Wilkerson, I call your attention here to a small rectangular drawing that appears on the map and in red it says—no, in blue it says, "wheel drop pit," that is about where the wheel drop pit is located, is it not?

A. Yes, sir.

Q. Various tracks indicated?

A. Yes.

Q. You said just before the accident occurred, you had been in some building for a drink of water, did you not?

A. Yes, sir.

Q. Which building was it?

A. What we call the "battery shop," this one right here.

Q. And the battery—it says, "Battery house" there?

A. That is it.

Q. And the number is 124. May the record indicate that that is the building that he indicated, and it appears that the Battery House is some distance to the north of the wheel pit?

A. Yes, sir.

Q. I see; you may take the stand. And about what time of day was it, Mr. Wilkerson, when you were in the Battery House for the drink?

A. Oh, about 10.25 A. M.

Q. Now, after you left the Battery House, pick up your story and tell the jury what happened, please.

A. On coming out of the Battery House, I came out on the west side of the Battery House next to Track 24, came out [fol. 55] and walked around end of wheel track over next to track 23½. I walked up the west side of the tourist car, expecting to find the man in charge of the drop-pit, who is Mr. Hawkins, working on that side of the pit.

Q. Which side?

A. On the west side of the car. On reaching the pit, I found he wasn't on the west side, but from the sound of his voice talking to his helper, I took it he was just on the east side of the car in the pit with his helper. I started coming around the chain, put my right hand on the top of the post, came around the chain and turned around and started to cross the cover board, putting my right foot on the cover board. As I did so, this board felt to me like there was a little rock or gravel which caused it to tip under the weight of my foot, starting my foot to slide and away I went to the bottom of the pit. As I went down, I hit my right hand right through this joint on the concrete wall with all my weight. I endeavored to catch myself in this manner as I went down into the pit, but when I reached the length of my arm, the hands slipped off, and I lit with my right foot across this south rail in that pit, spraining my ankle, and I fell backwards across the other rail with my ribs down into the lower part of the pit, breaking what I thought at the time was two ribs, but on later examination, the doctor tells me the x-ray shows I broke three ribs.

Q. Were there any men working in the pit at that time?

A. Mr. Hawkins and his helper were on the opposite side of the car. Well, Mr. Hawkins, I discovered, was underneath of the car on a board under there, adjusting some brake levers; his helper was on the south side of the car.

Q. Now, what happened after the fall had occurred?

[fol. 56] A. Mr. Johnson came running over there shortly. By that time I had gone in—pulled myself into kind of a sitting position. He wanted to help me out. I says, "Leave me sit for a few minutes until I kinda get my breath; maybe I can come out by my own—by myself," which I later did.

Q. Later you were out of the pit with your own hands?

A. Yes, sir.

Q. One question: What did you want to see Mr. Hawkins about?

A. I went to find Mr. Hawkins to see if he was through with this particular car so the car could be moved and I could go get another bad-order car that I knew they were in a hurry for and spot it for him, so he could get the other car done for our noon—for a two o'clock train, I believe it was wanted for.

Q. Did you then have in your possession orders pertaining to the repair of this second car?

A. Yes, sir, I had been instructed that morning in regard to it.

Q. Was the blue flag up, do you remember, at the time you went hunting for him?

A. Yes, sir.

Q. Had you received any information at that time as to when the repair work on this tourist car would be completed?

A. I hadn't received no information, no, sir, only that by observation I noticed that the wheel was in, and I knew that he was getting pretty near done with the car, would be in a few minutes if he wasn't already finishing up.

Q. The wheel had been installed, you observed that?

A. Yes, sir.

Q. That was on the west side?

A. Yes, sir.

[fol. 57] Q. Now, after you got out of the wheel pit, just tell the jury what happened to you, where you were taken?

A. Well, I stood around for a few minutes and kinda getting my breath and getting straightened out a little bit, see how I was going to feel. I was then taken over to the, what we call the "emergency hospital," which is about 300 feet or 350 feet there from where this pit is located to the company doctor, and, on examination, he found I had these broken ribs. He treated me at that time.

(Testimony as to damages omitted.)

Mr. Black: You may cross-examine.

Cross-examination.

By Mr. McCarthy:

Q. As I understood you to say that your ribs are all right now, is that correct? Your ribs are all right now?

A. They are at the present time, yes, sir, other than as a show of lumps where the breaks were.

Q. Cause you no pain?

A. No, no pain.

Q. Your right ankle is all right?

A. Yes, sir.

Q. Now, let me go back; let me go back here to the time when you went to the Battery House to get a drink of water, and, after you got a drink of water, I believe you stated that you came out of the Battery House on the west hand side?

A. West side.

Q. West side of the Battery House. And you could see at that time that the car men were nearly completed with the work on the car that was spotted over the wheel pit?

A. Yes, sir.

Q. Is that right? You couldn't see them on the west side of the car, could you?

A. No, sir, I didn't see them.

[fol. 58] Q. So that you knew that they were somewhere other than the west side of the car?

A. I expected to find them working in the pit just under the——

Q. Just under the car?

A. Just under the car on the west side.

Q. And you could see by observation when you were up here at the Battery House that they were nearly through with their work?

A. Yes, sir.

Q. Furthermore, you knew, of course, that there was a blue flag?

A. Yes, sir.

Q. On the track, and that blue flag, of course, is placed there by the men that work on the car?

A. Yes, sir.

Q. And you knew when the men were through with their work on the car that they, and they only, would move the blue flag?

A. Yes, sir.

Q. Removal of that blue flag would be a signal that they were through with their work on the car?

A. Yes.

Q. When the blue flag was moved, you could come in, get the car off the pit?

A. Yes, sir.

Q. When you were up here on the west side of the Battery House, you knew also that—from your observation, that the pit was open and that the men were working on the pit?

A. Yes, sir.

Q. And that the safety chains were up on three sides of the pit?

A. Yes, sir.

[fol. 59] Q. And that was before you ever—you knew all those facts before you ever began to go down towards the pit?

A. Yes, sir.

Q. Now, you stated you wanted some additional information?

A. Yes, sir.

Q. From the men that were in the pit about when you could move the car?

A. Yes, sir.

Q. So, in order to get that information, you decided that you would go down in the direction of the pit, is that correct?

A. Yes, sir.

Q. And you decided you would go from the Battery House which was—we will refer to this Defendant's Exhibit 3; you were up here at the Battery House, and that is—oh, would you estimate that is 150 yards probably from the wheel pit?

A. Something like that; I don't know what the exact distance is.

Q. Well, it is considerable distance?

A. Considerable distance, yes.

Q. But still you could see if any men were down along the west side of the pit?

A. Yes, sir.

Q. And you walked down, you said, between the wheel track—this track here, and track 23½?

A. Yes, sir.

Q. And as you were on your way down, did you see Mr. Hawkins?

A. I did not.

Q. One of the pit men?

A. I did not.

[fol. 60] Q. Would you remember if you had seen him?

A. Yes, sir.

Q. And when you got right to this point on the pit at the north—on the north side of the pit and the west side of the car on track 23½, you stated that you could hear the men talking under the car?

A. Yes, sir.

Q. And did you ask them at that time for the information that you desired?

A. No, sir, I did not.

Q. You could have asked them?

A. I could have.

Q. And at that point, what did you decide that you would do?

A. I just—from my direction of the voices, I took it they were on the other side of the car.

Q. Took it they were over on the east side of the pit?

A. East side of the car.

Q. You couldn't see them under there until you got there?

A. No, sir.

Q. But you could hear them talking?

A. Yes, sir.

Q. Now, when you were up here at the Battery House and you knew that the men were down in the pit, you could have decided, could you not, to have gone around the north end of this car and down on the east side of the car that is on track 23½?

A. I could have, yes, sir.

Q. No one told you you had to go down on the west side of the car?

A. No, sir.

Q. You had no orders or instructions to that effect?

A. I had no orders, no, sir, but I wanted to talk——

[fol. 61] Q. The—go ahead.

A. I wanted to get the information from Mr. Hawkins that I wanted and he works on the west side of the car.

Q. You wanted to get this information, so you went down to the pit to get it?

A. Yes, sir, went to the place he usually worked.

Q. But you could have gone around the north end of the car on track 23½ and down on the east side of the car?

A. Yes, sir.

Q. And when you were at this point and after you had heard them talking, you could have gone around the west end of the pit, of the wheel pit, outside of the chains and around the south end of the car, then onto the east side, could you not?

A. Yes, sir, I could have.

Q. Now, when you went through this space that you say—you state you did, between the chain post and the car, you have never measured that distance between there, have you?

A. No, sir.

Q. Was it necessary for you to turn sideways?

A. It was.

Q. And what position was your body facing?

A. Facing the west.

Q. Did you take hold of the chain post?

A. I did.

Q. And then did you have to go a short distance westward in order to get onto the crossing board?

A. No, sir, I don't think I went west over six or eight inches; just went around the post, turned around and stepped onto the board with my right foot.

Q. You stepped onto the board with your right foot?

A. Yes, sir.

[fol. 62] Q. What is your recollection, Mr. Wilkerson, as to the distance of the east edge of this crossing board from the chain post?

A. As near as I can recall, it was within four or five inches of a direct line with the two posts.

Q. So that the east edge of the crossing board, you say, was four or five inches?

A. As near as I can recollect, yes, sir.

Q. You recall the deposition which you gave under oath over at Denver?

A. Yes, sir.

Q. On page 21 of the deposition, did I ask you this question, referring to this same board:

"Where was that located with reference to track 23½?

"A. It was about something like forty or forty-eight inches from the rail. That's from the west rail."

A. Yes, sir.

Q. "Q. About forty to forty-eight inches from the west rail over track 23½"?

A. Yes, sir.

Q. Did you so testify?

A. Yes, sir.

Q. Was it true?

A. As far as I know, it was.

Q. Did you also testify:

"Q. What was the position of the east edge of that cover board with reference to the safety chain post next to the track?

"A. It was setting back about two feet."

Did you so testify?

A. I don't think I testified to that fact at all.

Q. You didn't testify to it?

[fol. 63] A. I don't think I did.

Q. It isn't true?

A. No, sir.

Q. You realize, of course, that at that time you were taking an oath?

A. Yes, sir.

Q. And you deny that you did state that the board was setting back, the east edge of the——

A. I don't think the board was back that far.

Q. You didn't so state at that time?

A. No, sir.

Q. At that time, did you also testify as follows:

"Q. That is the east edge?

"A. Yes, sir.

"Q. So that the east edge of the cover board was about two feet west of the safety chain post?

"A. Yes, sir; of course that measurement is just a guess.

"Q. I understand that it is just your estimate.

"A. That is my best estimate, yes, sir."

Did you so testify at the time you gave this deposition in Denver?

A. As near as I can recollect, the board was back about ten or twelve inches, or something like that, or I guessed at that.

Q. Then a moment ago you said four or five inches; now you say ten or twelve inches?

A. It was back a little ways behind the post; I don't know just how far.

Q. Did you so testify at the time you took—or at the time this deposition was taken, that the east edge of the board [fol. 64] was two feet west of the safety chain post?

A. I don't remember of testifying to that fact.

Q. Mr. Wilkerson, as I recall your testimony, when Mr. Black was examining you, you said that when you spotted this car on the pit, that you gave your instructions from the east side over on this side of the car, the east side of it?

A. East side of the car, yes, sir.

Q. And at that time, the pit at this place was covered up?

A. Yes, sir.

Q. On the east side, the cover boards were on the pit?

A. Yes, sir.

Q. And you were aware of that fact, then, when you were up in the Battery House and before you decided to go down to the pit, you were aware, of course, that there was no obstruction on the east of this car, and I think you testified you could have gone down here, is that correct?

A. Well, those men working on that car, it would be necessary for them to remove them boards on the east side of that car to do that work.

Q. Oh, I misunderstood your testimony, then. Then this pit would be open on this side?

A. The pit was closed when I spotted the car, but when the men were at work on the car, the pit would have to be open.

Q. Then the pit was open on the east side?

A. Yes, sir.

Q. And when the—when men are working on the car, is the pit usually open on the east side?

A. The pit must be open both sides.

Q. But, nevertheless, you still could have gone down around the north end of the car?

[fol. 65] A. Yes, sir.

Q. And to the north edge of the pit on the east side, and secured the information you needed?

A. Yes, sir.

Q. And there was no obstructions down to the point of the pit?

A. No, sir.

Q. Which would have prevented your getting there?

A. No, sir.

Q. And there was no obstruction around this edge of the safety—around the west edge of the safety chain, and around the south end of the car to the east side of the car?

A. No, sir.

Q. You could have gone that way.

A. I could have gone that way, yes, sir.

Q. It was your own decision you went down the west side of the car?

A. Went down expecting to find Mr. Hawkins on that side of the car, man I wanted to confer with.

Q. You could see when you were up at the Battery House he wasn't on the west side?

A. No, I couldn't see that because I expected to find him working just under the edge of the pit, under the car there on that side.

Q. I believe in your statement a few moments ago you said that when you started to cross this board, it felt like there was a pebble or a rock?

A. Yes, sir.

Q. Did you see a pebble or a rock?

A. I did not; I didn't examine it.

[fol. 66] Q. So that you were just—that's just a guess?

A. That is a guess, yes, sir.

Q. Where was that—where did it seem like that rock was on the edge of the board——

A. On the— —

Q. Or on the board?

A. Under the board.

Q. You didn't examine the board?

A. No, sir.

Q. And it only seemed like it?

A. The board felt to me like it give, like there would be a pebble under there, enough to start my foot to slipping.

Q. You are just guessing whether or not there was one?

A. Yes, sir.

Mr. McCarthy: I think that's all.

Mr. Black: That's all, thanks.

The Court: I would like to ask this question: he said the pit had to be uncovered; I take it that was for the purpose of light. Is that it or some other reason?

Mr. Black: I will asked about that, your Honor.

Mr. McCarthy: He hasn't testified as to that fact.

The Court: I don't know.

Mr. McCarthy: I understood him to say the pit had to be opened so the men could work on it; that was my understanding.

The Court: I wondered why; I just wanted an explanation. He said it had to be open on both sides.

(Discussion.)

A Juror: Your Honor, I would like to have it determined on which side of the board he fell, towards the car or on the other side?

The Court: Mr. Black, you may——

[fol. 67] Redirect examination.

By Mr. Black:

Q. Mr. Wilkerson, will you describe your fall completely and clearly to the jury and tell them which side of the board you fell from, the east or the west side?

A. As I stated before, came in this way, with my right hand on the post; stepped in here, stepped onto the board with my right foot and my foot slipped enough to throw me off balance, and I went down to the west of the board into the pit.

Q. Where did you hit your hand?

A. Hit my hand on the top of the concrete wall, right about in there, right close to the edge of the board as I went down.

Q. Record may show that the witness indicates the place in the south wall of the pit at the top; that is, the top of the south wall, just to the west of the board.

A Juror: May I ask a question? Is that board stationary, or can it be removed?

Mr. Black: Address your question to his Honor.

By Mr. Black:

Q. Mr. Wilkerson, will you describe to the jury just how that board is made and how it is placed over the opening leading down into the pit?

A. This board consists of two or three pieces of lumber bolted together on—with a piece of angle iron at each end.

That board is movable. That board there can be moved clear over to this end if they want to move it over there. It isn't stationary in there at all. It can be removed at any time they wish to move it.

The Court: You have the boards here in the courtroom?

Mr. Bagley: Yes, your Honor.

Mr. Black: That is all right; let's have the board, then.

[fol. 68] Mr. Bagley: Perhaps we better have this marked as Defendant's Exhibit 4.

Mr. Black: Agreeable, your Honor.

The Court: You may refer to it as such.

By Mr. Black:

Q. Now, Mr. Wilkerson, the board here that is displayed to the jury has been identified as Defendant's Exhibit 4, I will ask you to examine it and tell the jury if that was the board that was across the pit at the time you fell?

A. It looks like it, yes. Looks like same one I fell off. I don't know whether at this time it is—it may have been changed with some other board.

Q. Boards are interchangeable?

A. Yes, boards are interchangeable.

Q. But as far as its appearance, it looks like that board?

A. Yes, sir, it is a similar board to that.

Q. You may take the stand.

Mr. Black: Your Honor, I desire to remove this part from the deposition of Mr. Wilkerson and offer it here as an independent exhibit.

Mr. Bagley: We have no objection to that. I think the photograph is already marked as Defendant's Exhibit 1.

The Court: That's the one you have heretofore referred to?

Mr. Bagley: Yes.

(Discussion.)

The Court: Go right ahead with your examination.

Q. Mr. Wilkerson, I show you here this photograph that was made a part of your deposition, will ask you if this is a fair likeness of the pit, the wheel pit as it existed at the time you were injured?

A. Yes, sir.

Q. Now, the chains—what about the chains: are they about [fol. 69] the condition they were then or is there some difference?

A. The chains at the time were down within about a foot of this rail across this wheel track. They were sagged away down—those chains have been shortened and tightened up after I got hurt, before this was taken.

Q. Safety posts upon which chains are attached are in the same place, same condition, are they not?

A. Yes, sir.

Q. I call your attention to the board that extends across the pit just to the west of the posts, is the board in about the same position it was when you fell?

A. Yes, sir, about that.

Q. You say about that same position?

A. About that same position.

Q. As near as you now recall?

A. As near as I now recall.

Q. When you went into the pit, you may state whether or not the board came in also, or did it remain in place?

A. The board remained in place.

Q. You stated there was another board across the pit immediately to the west of the rail; I call your attention to the board that appears in the photograph immediately to the west of the rail; is that about the same width of board and same kind of board?

A. About the same, yes, sir.

Q. I call your attention to the space between the two boards—that is, one immediately to the west of the rail, and one you were walking over when you were hurt; is that space about the same?

A. About the same, yes, sir.

[fol. 70] Q. Picture fairly shows——

A. Fairly shows about the same conditions.

Mr. Black: Now, your Honor, we desire to offer the exhibit in evidence.

The Court: Been received.

Mr. Black: It has been received? Haven't even offered it.

Mr. McCarthy: We haven't any objection.

The Court: I think you will find I stated in the record when you began the examination it was received.

Mr. Black: There can't be any question it is in the record at this time, and we will take it out and make it a part of the examination of Mr.——

(Discussion.)

Mr. Black: That is all thanks. You may cross-examine.

Recross examination.

By Mr. McCarthy:

Q. The other board you just referred to in the photograph is shown on this model as the board right next to the rail on 23½?

A. Yes, sir.

Q. And the overhang of the car completely covers up that board?

A. Yes, sir.

Q. That is not the board you used?

A. No, sir.

Q. Or the board from which you fell?

A. At the time I made my statement to the claim department, I was under the impression that that was the board I fell from.

Q. But you subsequently——

A. But I said on later examination——

[fol. 71] Q. You went back——

A. I went back and found that the board next to the rail would not fit outside; therefore, that board would only fit in that one particular spot.

Q. And that was completely covered up by the overhang of the car?

A. That was completely covered with the overhang of the car.

Q. One other question: you were referring to the fact in that photograph that the chain was slumped down——

A. Yes, sir.

Q. —somewhat more than is shown in that photograph?

A. Yes, sir.

Q. Did you ever go over or under that chain?

A. I did not, at no time.

Q. Board was located west of the chain post, was it not?

A. Yes, sir.

Q. And it would have been much quicker for you to go over or under the chain?

A. Chain was too high at the post to go over, have to crawl under.

Q. Why didn't you go over it or under it?

A. Because I didn't want to.

Q. Is that the only answer you can give?

A. It wasn't necessary for me to go over the chain.

Mr. McCarthy: That's all.

Mr. Black: I just want to recall Mr. Wilkerson, your Honor, for a question.

The Court: All right.

Whereupon, CLYDE WILKERSON, having previously been duly sworn, was recalled to the witness stand for further examination.

[fol. 72] Further redirect examination.

By Mr. Black:

Q. I believe you testified heretofore that you held the day job in the yards at the time these chains—the posts were installed?

A. Yes, sir.

Q. You may state whether or not you held that job continuously from the time they were installed up until the time you were injured?

A. Yes, sir.

Q. During that period of time, did you ever remember of any single day when you—when switchmen and other men didn't cross over the pit as you indicated you did?

A. Yes.

Mr. McCarthy: I object——

A. I don't remember one time that they didn't.

Mr. McCarthy: —repetitious; gone into that fully.

The Court: I think that subject was covered; maybe not identical question, but the subject. He has already answered.

Mr. McCarthy: I move the answer be stricken.

The Court: Motion denied.

Mr. Black: We rest, your Honor.

The Court: You may proceed.

(Mr. McCarthy makes opening statement to the jury.)

Mr. McCarthy: I would like to call Mr. Elledge.

EVERETTE WILLIAM ELLEDGE, called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

Direct examination.

By Mr. McCarthy:

Q. Mr. Elledge, will you state your name and address?
A. Everette William Elledge, 2401 Grove Street, Denver, Colorado.

[fol. 73] The Court: I wouldn't be able to spell your name.
A. E-l-l-e-d-g-e.
The Court: What is your full name?
A. Everette William Elledge.

Q. You are an employee of the Rio Grande railroad?
A. Yes, sir.
Q. Will you state your position with the railroad?
A. I am general car foreman at Denver, Colorado.
Q. Raise your voice little bit. How many years have you held that position?
A. At Denver, I have been general car foreman four years.
Q. And you have had considerable car experience before that time?
A. Yes, sir, all my life.
Q. You have been in railroad business all your life, and does the—as part of your duties as car foreman at the Burnham yards in Denver, you have charge of the work that is done on the wheel pit at Denver?
A. Yes.
Q. And the cars that are repaired on this wheel pit?
A. Yes, sir.
Q. And you say you held that position for a number of years and are familiar with the facts and circumstances surrounding that pit?
A. Yes, sir.
Q. Now, Mr. Elledge, let me call your attention to the date of July 26, 1945, which that date it is agreed that Mr. Wilkerson received some injuries on that day in a fall in the wheel pit. Now, did you have occasion to go to the vicinity of that wheel pit at about that time?
A. Yes, sir.

[fol. 74] Q. Will you state the circumstances and when it was?

A. Well, it was about 10:30 A. M. in the morning that I understand that he dropped in the pit, but I was something like fifteen to twenty minutes later before I received notice. I went to the pit immediately after the injury.

Q. About fifteen or twenty minutes after you state he was injured, you arrived at the pit?

A. Yes, sir.

Q. And at that time was Mr. Wilkerson there?

A. No, sir.

Q. He had left. Were there present at that time men who were working on the pit?

A. Yes, sir.

Q. And who you understood had been working on the pit at about the time Mr. Wilkerson was hurt?

A. Yes, sir.

Q. And at that time did you make any inquiry as to whether or not the physical conditions existing at that time were the same as when Mr. Wilkerson was injured?

A. I did.

Q. At that time did you make an investigation of the physical conditions at the pit?

A. I did.

Q. And will you state to the court and to the jury just what the situation was with reference to the safety chain posts and safety chains?

A. At the time I made this check of the pit, safety chains were in position; the pit was open for work.

Q. And what was the situation with reference to the cover boards over the pit?

A. There was one board west of the chain posts was the only one that was in there at that time.

Q. One board west of the chain post?

[fol. 75] A. That's right.

Q. And shortly thereafter, Mr. Elledge, did you have occasion to make measurements of the pit and the physical objects at the pit?

A. Yes, the next day I made measurements of the complete pit.

Q. And at that time, were these objects—referring particularly to the boards and the safety chains, were they in the same position as when you were there the day before?

A. They were.

Q. At the time you made these measurements, Mr. Elledge, how far was the cover board—the east edge of the cover board—from these safety chain posts?

A. Nine and a half inches.

Q. Nine and a half inches?

A. Yes, sir.

Q. And how far were the safety chain posts from the west rail of track 23½?

A. Three foot.

Q. Three feet?

A. Yes, sir.

Q. And so that—three feet from the rail to the post and nine and a half inches from the post to the east edge of the cover board?

A. That's right.

Q. And how wide is that cover board?

A. Twenty-two inches.

Q. Twenty-two inches. And I show you, Mr. Elledge, what has been marked for identification as Defendant's Exhibit 4, I believe, and ask you if you can identify that?

A. It's the same board that was there on the day that——

[fol. 76] Q. Is that the same cover board that was across the pit just west of the safety chain posts?

A. Yes, sir.

Q. And this is the same board you have just referred to as twenty-two inches wide?

A. Yes, sir.

Q. And how wide is this pit, this wheel pit?

A. Four foot, two and a half inches.

Q. Four foot, two and a half inches from inside of the—from one edge of the pit to the other inside edge?

A. That's right.

Q. And describe, if you will, just how this board fits over the pit.

A. This board is placed in position—fits firm when placed in there, be position where it always stays.

Q. Will you describe how these edges are constructed and how they fit?

A. The lip that holds the board in place is made of Z-iron, and it is secured with a strap over the top and holds it.

Q. Is this what you refer to as the Z-iron?

A. Yes, sir.

Q. Shape of "Z", with a strip of iron along the bottom with bolts and——

A. Yes, sir.

Q. How does this Z-iron fit over the edge of the wheel pit?

A. The lip—the top lip fits over the top of the cement wall to make it almost flush with the top of the ground.

Q. Does this side of the Z-iron fit against the side of the wheel pit?

A. Yes, sir.

Q. Does that fit down tight and snug?

A. Tight.

Q. And the edges of the pit itself, what material are [fol. 77] they made of where the Z-iron rests?

A. Cement, concrete.

Q. And what is this cover board used for in the pit, Mr. Elledge?

A. Well, it's used for cover rather than, when the pit is in operation, but men that work in the pit often use it for crossing.

Q. And do they also use it to do—state whether or not they use it in working on the car?

A. It's not used in working on a car necessarily; it is just a passage from one side of the pit to the other for those that work in the pit.

Q. And is it used to get down—and you may state whether or not it is used to get in the pit and out of the pit?

A. They use it to get down in on the carriage they work in—that is, the drop pit man does.

Q. Does a ladder lead down into the pit?

A. The ladder comes up from underneath on the carriage and they can get on the board, go down in the pit.

Q. And when the pit is not in operation, no car men are working on the pit, then state what the circumstances are with reference to the safety chains and the cover boards.

A. Well, the entire pit is covered with boards similar to this, and the chains are removed so——

Q. And this whole pit is covered with boards?

A. Yes, sir.

Q. Now, what is the usual situation with the pit on the east side?

A. It has cover boards over it, except when the pair of wheels is dropped, it is necessary to move a couple of boards in order——

Q. That would be a couple of the boards next to the car?

A. That's right.

[fol. 78] Q. Now, at the time you made these measurements, Mr. Elledge, did you have occasion to measure the distance between the safety chain post and the side of the car?

A. It's about seven inches right at the edge of the car.

Q. That is from the edge of the car to the safety chain post?

A. It's really five inches at the bottom from parallel with the car, but the post leans slightly out about two inches, I imagine.

Q. So that if the overhang here extends—the overhang of the car is this portion that leans over the rails, is it not?

A. That is it.

Q. Will you state again, Mr. Elledge, the measurements that you made from the safety chain post to the overhang of the car?

A. It was seven inches on that particular car right at the overhang—the post slightly leans out little—it is really five inches at the base when it is parallel with the car.

Q. And on a tourist pullman car, what is the customary overhang?

A. Thirty-one inches.

Q. Thirty-one inches?

A. Yes, sir.

Mr. Bagley: From what?

A. From the rail over——

Q. That's from the rail to the farthest extremity?

A. That's right.

Q. Outside extremity of the overhang. Now—well, withdraw that. And what kind of equipment is spotted over this pit for repair work?

A. All kinds of passenger equipment.

Q. And there are occasions when passenger equipment with a different overhang than a pullman tourist car is spotted over the pit?

[fol. 79] A. Yes, we have equipment in shorter cars that will have an increase in width of two to six inches, I believe.

Q. So that if an overhang of a standard pullman tourist car was 31 inches—two feet, seven inches—there are cars that come in with a larger overhang?

A. Yes, sir.

Q. Which of course would reduce the measurements that you gave for a standard pullman tourist car—the distances between the safety chain post and the overhang?

A. That's right.

Q. Now, there has been statements—withdraw that. At the time of this injury to Mr. Wilkerson in July 26, 1945, you may state whether or not the cars brought in and put over the pit at that time had bad-order cards on them.

A. I don't believe there was any at that time that had bad-order cards on them.

Q. Was there any practice in the yards at that time with reference to bad-order cards?

A. They use chalk in marking all the cars—the inspectors did—and the practice of marking was discontinued something like about two or three months ago.

Q. When were these bad-order cards instituted?

A. Well, I would say about—between two and three months ago.

Q. There was no such thing as a bad-order card on a car in July of 1945?

A. No, sir.

Q. Calling your attention to Defendant's Exhibit 4 that you have identified as a cover board, were you present when that board was removed from the pit?

A. Yes, sir.

Q. When was that, if you recall, approximately?

Mr. Black: Says on the back.

[fol. 80] A. July 8, I believe.

Q. Did you make a marking on the back of the board?

A. Yes, sir, I wrote my name on there and the date.

Q. You written here, "E. W. Elledge, eight dash twelve dash forty-six;" would that be about the time?

A. That would be it because I wrote that myself.

Q. So that this board was in use for a considerable time subsequent to July 26, 1945, from that date, at least, until the date you have marked on the back, is that correct?

A. That's right.

Q. And I will ask you to state whether or not this board, as you see it here today and as you have identified it, is in the same condition as when you examined the board fifteen minutes after Mr. Wilkerson was injured?

A. I would say it was in the same condition.

Q. Now, just one other question about the wheel pit: you

state that when men were working on the car that the cover boards were removed?

A. Yes, sir.

Q. Can you state the necessity for the removal of the cover boards?

A. It's necessary to remove the boards on account of the lowering wheels into the pit and transferring from one track to another; take out bad-order wheels and pick up the new.

Q. And this hoist which operates along rails in the bottom of the wheel pit can be moved up and down?

A. Yes, sir.

Q. Can it not? And the rails and the wheels were dropped down underneath the car and are brought up on another track, are they not?

A. That's right.

Q. Brought over to track—to what is called the "wheel track"?

[fol. 81] A. Wheel track is right.

Q. And to perform that operation, it is necessary to have the boards removed from the top of the wheel pit?

A. Yes, sir.

Q. By the way, did you measure the depth of this wheel pit?

A. It is ten feet and seven inches.

Mr. Black: What was that answer?

The Court: Ten feet and seven inches.

Q. Is that the depth from the top of the pit to the bottom flooring of the pit?

A. This extreme depth from the top to the floor.

Q. Ten feet, seven inches?

A. That's right.

Q. Oh, yes, how far from the edge of this wheel pit are these chain posts set back?

A. It's just about 19 inches; the wall is 18 inches.

Q. That is the cement wall?

A. Yes.

Q. Which forms a coping for the pit and the post sets back, you say, about 19 inches?

A. 19 inches, yes, sir.

Q. Did you tell me what the measurements were from of the wheel pit from this safety chain post to the west edge?

A. West edge of the pit or the——

Q. To the west safety chain, from east safety chain post to west safety chain?

A. It is 16 feet, five and a half inches.

Q. Sixteen feet, five and one half inches?

A. Yes.

Q. What is the distance from the safety chain post at the northwest corner to the safety chain post on the southwest corner?

A. Seven foot, six inches.

Q. Seven foot, six inches?

[fol. 82] The Court: Off the record.

(Discussion.)

Q. Do you know, Mr. Elledge, the distance between the edge of the overhang and the rail, the vertical distance?

A. Well, I believe on that particular car, it is 44 inches.

Q. About 44 inches?

A. 44.

Q. How high are those safety chain posts?

A. 42 inches.

Q. And are the chains around the chains fastened?

A. Forty inches above the ground.

Q. That is two inches below the top of the safety chain post?

A. That's right.

Q. Mr. Elledge, during the time that you have been car foreman in Burnham yards and have had supervision of this wheel pit, you may state whether or not you have at that—during all of that time, ever observed anyone other than car men working on the pit crossing between the safety chain post and a car on 23½ when the pit was open and the chains were up?

A. I have never seen anyone go around back of the posts between the car.

Q. Have you ever seen anyone go over or under the chains?

A. No, sir, I haven't. That is, other than men that's authorized to do work in the pit.

Q. The car men that were working on the pit?

A. That's right.

Q. How frequently are you in the vicinity of this wheel pit when the safety chains are up and the car is on the track?

A. Every day and several times during the day, I might. Some days I might be there once; some might be there a half a dozen times during the day.

[fol. 83] Cross-examination.

By Mr. Black:

Q. Mr. Elledge, did you have anything to do with the preparation of the exhibit here, Exhibit 2?

A. I never made the exhibit, no, or had anything to do with that part.

Q. You didn't participate in the making or construction of the exhibit?

A. No, sir, I didn't.

Q. When was the first time you ever saw it?

A. I believe it was about July the 8th, or so.

Q. Last July?

A. No, this July.

Q. That is what I mean, this July, 1946?

A. That's right.

Q. Now, Mr. Elledge, I notice here from the exhibit that the western portion of the wheel pit is all uncovered with the exception of a board that crosses over it directly to the west, to the west rail, and the board that crosses over it to the west of the post. Does that fairly show the condition of the wheel pit when men are working there?

A. Yes, sir.

Q. So, then, when men are working in the wheel pit, the usual condition of the pit is that it is all uncovered to the west except for the board immediately adjoining the west rail and the board across the pit to the west of the posts?

A. On that question, I might say this, that the board next to the rail isn't always out for different kinds of repairs, but in case of a wheel change, it is necessary that they be removed on account——

[fol. 84] Q. But the board to the west of the post is there continuously?

A. That post is left in place continually.

Q. Never take that board out?

A. No cases take that board out.

Q. You never remember an occasion when that board was out of place, do you?

A. I have never seen the board out of there.

Q. Reason board is there is so men can cross over it, isn't that true?

A. It is for the purpose of men that work in the pit to use, certainly.

Q. The purpose of that board being left in place is to provide means so men can cross over the pit, isn't that true?

A. That's right; they use it to cross the pit.

Q. The board that is brought here and identified in evidence as Exhibit 4 is the board that was left to cross the pit at that point, isn't that true?

A. That's right.

Q. And you were there when it was removed?

A. I was.

Q. Now, again, I believe you stated this, but I want to have it again before the jury: what was the distance between the west rail and the east edge of the board at the time it was removed?

A. Three feet, nine and a half inches.

Q. That would be 45½ inches, as I figure it, is that right?

A. Yes.

Q. So there was 45½ inches of space between the rail and the board at the time it was taken out?

[fol. 85] A. That's right.

Q. Would you say that would be about the amount of space that was there; that is, between the rail and the board at the time Wilkerson was injured?

A. I'd say that was it.

Q. And that you stated, as I recall your testimony, that the posts are erected three foot outward or three feet to the west of the rail?

A. That's right.

Q. There is a hole, is there not, down in the cement where the posts are put, placed in when they are used?

A. We have a piece of metal tubing that is cemented in the ground that these posts are slipped in.

Q. And the tube is little larger than the posts, I assume, so post slips right down?

A. Large enough so works freely.

Q. Only time posts are there and the chains stand there is when car is on 23½ and men are working there?

A. When making wheel change on 23½.

Q. So that when that shift goes off shift at four o'clock in the afternoon, the work is done; then the rest of the boards

are placed over the pit, the posts are pulled out of their holes, and the chains are taken down?

A. That's right.

Q. And that was the condition—that was the method of doing business when Wilkerson was hurt; that is true?

A. That's right.

Q. You stated that the overhang of an ordinary tourist car is 31 and one-half inches?

A. Thirty-one inches.

Q. Thirty-one inches?

[fol. 86] A. That's right.

Q. Are they all the same; is that standard?

A. That is standard.

Q. And I suppose you speak of that overhang as being the overhang up the body of the car?

A. That's right.

Q. You told the jury that the floor of the car—the floor of the car was what. How high is that?

A. It is forty-four inches above the rail.

Q. Forty-four inches above the rail; the rail is seven inches?

A. Yes, I believe that is seven-inch rail there, I am quite sure.

Q. So, then, the floor would be 51 inches above the ground?

A. That would be about right.

Q. Fifty-one inches above the ground. The post is only 42 inches?

A. That's right.

Q. In height. So, then, the top of the post would be nine inches below the floor of the car when the car was standing on the rail; that is right, isn't it?

A. I believe that's right.

Q. Not any doubt about it, is there? Is that right, about nine inches?

A. Let's say 42; have to figure here.

Q. You said it was 44 inches, the floor of the car was 44 inches above the rail and the rail was seven inches, so seven and 44 is 51, and if the top of the posts—would be nine inches below the floor of the car?

A. That's right.

(Discussion.)

Q. I call your attention now to Exhibit 1, which is the [fol. 87] photograph, and will ask you to state to the jury whether or not that is the fair likeness of the western portion of the wheel pit; it is, isn't it?

A. Yes.

Q. And I call your attention to the board that appears immediately to the west of the post, will ask you if that is where the board, Exhibit 4, was when you removed it, about there?

A. Well, it is about there, where it is supposed to.

Q. I call your attention here to the fact that it appears at the top of the post or considerable distance lower than the floor of the car; is that about right?

A. Should be about nine and a half inches below there.

Q. Underneath the floor of the car; there is a lot of clearance, isn't there, for a man that was going around there?

A. No, there isn't in all the places along here; when trucks or batteries sitting there, couldn't, their springs stick out. You couldn't——

Q. Ask you to state whether or not this is a fair likeness and contains a fair indication of the amount of space between the car and the posts when the car is standing on the track?

A. About right.

Mr. Black: Have the jury examine the picture at this point?

The Court: That is all right.

Q. Mr. Elledge, I will now ask you to state if you know what the overhang of the outside extremity of the journal box is on a tourist pullman?

(Discussion.)

Mr. Black: If we get an answer, we will show the jury where the journal box is.

A. Well, sir, I don't believe I have the exact distance that would be out there, and be accurate on it; I wouldn't be [fol. 88] able to state. See, different types of journal boxes, and they are not all the same.

Q. You understand, do you not, that the car here in the miniature is supposed to be an exact replica—of course on a reduced scale—of the car that was standing there when Mr. Wilkerson was hurt?

A. That's right.

Q. I want you to step down and show the jury what the journal boxes are that I refer to; the journal box that I am interested in stands over the pit. I want you all to see.

A. Journal box along here, one in the middle here, and one here.

Q. Now, it is true, is it not, that the outside extremity of the journal box protrudes outward farther than any other portion of the car until you come up to the floor of the car?

A. Yes, it protrudes out farther than any of the rest until you get——

Q. To the floor?

A. That's right.

Q. I think we agreed the floor of the car there, first part of the floor of the car, was nine inches above the top of the post?

A. I didn't get that.

Q. The floor of the car is nine inches above the top of the post?

A. That's right.

Q. You may take the stand, now, if you please, Mr. Elledge. Will you state again to the jury just what your duties are down there in the yards?

A. I am general car foreman and I superintend the maintenance of the equipment, freight and passenger.

[fol. 89] Q. So, you have the job of seeing to it that the proper repairs are made on both the freight and the passenger cars?

A. That's right.

Q. Now, you handle thousands of cars a day in those yards, don't you, hundreds of them?

A. Well, we handle hundreds of them, yes.

Q. How many places of repair do you have under your supervision?

A. I have nine departments within the one, yes. I am general foreman of nine departments.

Q. And there are a great many men working in each of those nine departments?

A. That's right.

Q. Do you have supervision of the car inspectors?

A. Yes, sir.

Q. And you have a great number of car inspectors working under you?

A. Yes, sir.

Q. Now, you didn't mean to tell the jury that in your eight-hour day, you spend any great period of time here in the vicinity of these pits, did you?

A. Well, I tell you, we do have more calls, maybe, to place of that kind, due to the fact that you have certain defects and things shows up—that is, questions of how you handle repairs and that, and I make quite a few different departments, it is very true, and I make them every day.

Q. But when you do make a call here in the wheel pit, you don't usually stay very long, do you? You have competent men there to do the work, and you don't have to stay there long, do you?

A. No, I wouldn't be able to stay there any length of time.

Q. When you are there, you don't pay much attention to [fol. 90] what these switch crews are doing, do you?

A. Well, in a great many cases, I am there when no switch crew — around, that is true.

Q. I say, you don't pay much attention to the work of the switchmen, do you?

A. No, I don't pay a lot of attention to their work.

Q. You are interested in the physical defects of the cars, aren't you?

A. Yes, sir.

Q. And I suppose you are interested in seeing the blue flag rule is complied with, things of that kind?

A. Yes.

Q. That the fellows are on the job?

A. That's right.

Q. And, being superintendent of these huge yards, these large yards in Denver, it wouldn't be possible for you to spend much time there in the vicinity of the wheel pit, would it?

A. No, I don't spend a lot of time there.

Q. Now, one matter I wanted to clear up: do I understand you to state that when car wheels are removed from the cars, that they are brought back over to the track that has been indicated here as the "wheel track"?

A. Yes, sir.

Q. Your answer is "yes"?

A. Yes.

Q. It is for that reason that you keep the portion of the wheel pit over these tracks—the wheel tracks—open while the boys are working on cars standing on 23½?

A. That's right.

Q. Now, the work that was going on when Wilkerson was injured is just the usual, ordinary work of repairing wheels, was it not?

A. Yes, sir.

[fol. 91] Q. And any wheels that were repaired would necessarily be brought first over to the wheel track and taken from there to the point of disposal, wherever it was?

A. That's right.

Q. So, it necessitated the opening of the wheel pit?

A. Yes, sir.

Q. And it was opened in the usual manner with the board across the pit, some—beginning some eight or nine or nine and a half inches—I have forgotten your testimony—to the west of the posts?

A. That's right.

Mr. Black: That's all, thanks.

Redirect examination.

By Mr. McCarthy:

Q. That is Defendant's Exhibit 5, I think that will clear up some of the questions. Mr. Elledge, I show you what has been marked for identification as Defendant's Exhibit 5, and will ask you if you can identify the scene of this picture?

A. I can.

Q. And you state what it is?

A. It's a picture of a man standing next to the car, to the chain post, on the west side and north side of the pit.

Q. And were you present when this picture was taken, Mr. Elledge?

A. Yes, sir.

Q. And do you know who the man is in the picture?

A. Yes, sir.

Q. Who is it?

A. It is A. G. Johnson.

Q. Mr. Johnson; he is an employee there in the yards?

A. Yes, sir.

Q. And is he a—from your observation, is he a man about the same height as Mr. Wilkerson?

[fol. 92] A. Just about the same size man as Mr. ——

Q. And is this picture a fair and accurate representation of the chain posts and the chains and the boards, the cover

boards, on the pit at the time that you came to the pit shortly after Mr. Wilkerson was injured?

Mr. Black: Object to the question——

A. Yes, sir.

Mr. Black: —duplicitious, on the ground that the chain post on the north and east is not observable and can not be seen in the photograph.

The Court: Objection overruled.

Q. Will you answer my question? I think you already answered it, "yes"?

A. Yes.

Mr. McCarthy: I think that's enough. I offer this exhibit in evidence, your Honor.

Mr. Black: Object to it on the ground it isn't a fair representation of any matters before the court, produced especially for the purpose, perhaps, of confusion as much as anything else, and I object to it on that ground.

The Court: Objection overruled; it may be received in evidence.

Mr. McCarthy: May this be passed around to the jury?

The Court: Yes, Mr. Black may want to cross examine the witness about it; make whatever explanations he desired with respect to the representations there appearing.

Mr. McCarthy: You may cross examine.

Recross-examination.

By Mr. Black:

Q. Mr. Elledge, when was this picture taken, if you know?

A. I wouldn't be able to state the date that was taken.

Q. Were you present when it was taken?

A. I was.

[fol. 93] Q. Did you help arrange a scene or anything of that kind?

A. No, I had nothing to do with arranging the scene.

Q. But you were there when it was taken?

A. I was.

Q. Now, Mr. Elledge, the man that appears in the picture is facing directly down the track, is he not?

A. Yes, sir.

Q. You can't see that north post at all, can you?

A. No, sir.

Q. Can't see that at all. How high up the top of it comes on the body of the man, we can't tell here with any accuracy, can we, except the chain——

A. You couldn't tell exact; it is 42 inches above the ground, the top of the post is.

Q. If a man were standing with his back to the car, do you think the post would be observable?

A. You may be able to see a slight part of the top of it, I wouldn't know.

Q. Did you take any pictures that day with a man standing with his back against the car?

A. No.

Q. You didn't take any pictures like that?

A. I don't get your question.

Q. At the time the picture was taken, Exhibit 5, did you take any pictures with a man standing with his back against the car?

A. Well, they taken three or four pictures; I could identify the pictures as the pit.

The Court: He said, did you take any.

A. I never take any pictures.

Q. Did you see any taken with a man with his back against the car?

A. I don't recall seeing any with back——

[fol. 94] Q. If they did, you wouldn't recall it now?

A. No.

Mr. Black: By the way, there is one question that I overlooked in cross-examination; may I ask that now?

The Court: Yes, if you are through with the picture, you might let the jury look at it while you proceed with your examination.

Q. One question, Mr. Elledge: I call your attention to the space between the board adjacent to the west rail and the board that extends over the pit to the west of the post, did you measure that space at the time?

A. You mean this opening in here?

Q. Yes.

A. It is 22 inches.

Q. It is 22 inches there. So the record will be clear, the opening between the two boards that go across the pit, Exhibit 1—the opening that is opposite from the post is 22 inches?

A. That's right.

Mr. Black: Your Honor, I am just indicating to the jury the space that the witness identified there so they will have in mind.

The Court: All right.

Mr. Black: That's all, thanks.

Mr. McCarthy: Mr. Johnson.

ANDERS G. JOHNSON, called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

Direct examination.

By Mr. Bagley:

Q. Your name is——

A. Anders G. Johnson.

Q. Where do you reside?

A. 3741 West Twenty-fifth Avenue, Denver, Colorado.

[fol. 95] Q. Are you employed by the trustees of the Denver and Rio Grande Western Railroad Company?

A. I am.

Q. How long have you been employed by those trustees, or by the railroad?

A. Twenty-four years.

Q. And in what capacity are you now employed?

A. As car man.

Q. And what are your duties as car man?

A. Right now I'm doing the flagging in the passenger yard.

Mr. Black: I didn't——

The Court: Flagging in the passenger yard.

Q. Were you employed as a car man in July of 1945?

A. I was.

Q. And how long prior to that date had you been employed as a car man?

A. Since September, 1922.

Q. And where do you perform your duties as a car man?

A. Now, all over the yard as a flagman.

Q. Is that out at the Burnham yard in Denver, Colorado?

A. That's in the new coach yard at Burnham in Denver, Colorado.

Q. Were you on duty the day that Mr. Wilkerson was injured in the wheel pit at the Burnham yards in Denver?

A. I was.

Q. And what time did you go to work?

A. At eight o'clock in the morning.

Q. And did you see Mr. Wilkerson after he had fallen into the pit?

A. I saw him in the pit after he had fallen in there.

Q. Did you see him immediately before he fell in the pit?

A. No.

Q. Now, when you saw him down in the pit, did you get [fol. 96] down there to try to help him out?

A. Yes.

Q. Did you assist him in getting out of the pit?

A. I was going to, but he walked out himself.

Q. He got out without your assistance?

A. He did.

Q. How did he get out?

A. Up the ladder on the hoist that they move their wheels on.

Q. Now, have you had occasion to work on that wheel pit yourself as a car man?

A. I worked there from the time they built it until September the 15, 1944.

Q. Now, can you tell us when that wheel pit was constructed?

A. We moved over there and started, changed the first pair of wheels there on May the 27th, 1942.

Q. 1942?

A. Yes.

Q. And do you know when the safety chains that guard the wheel pit were constructed?

A. I don't remember exactly, but they were put in there in the spring of 1945.

Q. Do you know what month in the year 1945 they were put there?

A. I think it was around March—February or March, I don't remember which, somewhere in there.

Q. Now, when the car men are working in that pit, the pit is open, with the exception of a couple of boards, is that correct?

A. That is correct.

Q. Now, is it necessary to take those boards off when you are working in the wheel pit repairing a car?

A. It is, if you change wheels.

[fol. 97] Q. What kind of machinery do you have down in that pit to change the wheels?

A. We have a hydraulic hoist that runs on rails the entire length of the drop pit by an electric motor.

Q. So that there are tracks down in near the bottom of the wheel pit?

A. There is.

Q. And you use—you carry the wheels along that track on this hoist?

A. We do.

Q. Now, you are familiar with the board that has been marked Defendant's Exhibit 4?

A. I am.

Q. Did you have occasion to examine that board shortly after Mr. Wilkerson was injured?

A. I did.

Q. Have you examined it again today?

A. Yes, enough to know it is the same board.

Q. And what can you say with respect to its condition now as compared with its condition at the time of the accident of Mr. Wilkerson?

A. Can't see no difference.

Q. Now, did you—withdraw that question. What do the car men use this board for when they are working in the wheel pit?

A. When they are removing and applying wheels to passenger cars, that board is used by the car men to walk from one side of the pit to the other, and it also supports you to go down on the hoist. The hoist has a platform about—oh, I would judge about forty inches below the top surface of the pit, and to get down into the pit, it assists you to get down and back up again.

Q. I will ask you whether or not you car men, while you are working in the pit, use that board as a brace to——

A. Yes.

Q. —brace against?

[fol. 98] A. It does; it helps as a support in case you slip and fall backward.

Q. Now, I will ask you whether or not that board fits firmly on the cement walls of that wheel pit?

Mr. Black: Objected to as leading and suggestive, your Honor; I object to it on the ground, leading and suggestive.

The Court: He may answer the question.

A. It fits very snugly.

Q. Does it have any play in it or any wobble to it?

A. It has not.

Q. I wonder if I may see that photograph. Mr. Johnson, will you please look at that photograph that has been marked Defendant's Exhibit 5; I will ask you whether you are the man that is standing in front of the guard post in that photograph?

A. I am.

Q. Now, after these chains were constructed—after these guard chains were erected, I will ask you whether you were working continuously in that pit during—from the time those chains were erected up to the time Mr. Wilkerson was injured?

A. No, I worked out in the yard as a flagman.

Q. Between the time these were put up and the time Mr. Wilkerson was injured?

A. Yes, sir, I was working in the yard as a flagman.

Q. Did you have occasion to come in, within observation of this wheel pit, in the performance of your duties as such?

A. Sometimes, yes.

Q. Have you any time in the course of your experiences out there in the Burnham yard, ever observed a switchman squeeze or crawl through that space between the guard post and a tourist car and pass over the pit by means of the board in question?

A. I have not.

[fol. 99] Q. Now, are those tracks in the bottom of that pit, are they up above the floor of the pit some distance?

A. There is six-inch timbers in the bottom that those lays on and spiked down to.

Mr. Bagley: I believe that's all, Mr. Johnson.

Cross-examination.

By Mr. Black:

Q. When did you take up your work as a flagman in the yard there, Mr. Johnson?

A. September the 15th, 1944.

Q. You been working as a flagman ever since?

A. Yes.

Q. Whereabouts in the yard do you serve as flagman?

A. All of the new coach yard with the exception of the drop pit.

Q. So, you don't work as a flagman over by that pit?
A. No.
Q. That coach yard is a large yard there, isn't it?
A. Yes.
Q. What is your shift, Mr.——
A. Eight A. M. to four P. M.
Q. What are the duties of a flagman?
A. When they bring in a train——
Q. What is that?
A. When they bring a train into the yard, I flag both ends of it, and when it is time for the train to be taken down to the depot, I go through the train and around it and remove the flags when it is ready to go. If there is occasion to switch a bad-order car in or a car that is doubling, I go around the train, through the cars and notifies everybody they are going to move it, and then remove the flags so they can do their necessary switching.
[fol. 100] About how many trains do you work on on an average eight-hour, would you say, Mr. Johnson?
A. Oh, now we have four or five trains in a day.
Q. What was the situation in June and July of last year; I refer, of course, to 1945?
A. We had little more business then.
Q. You were busier then than you are now?
A. Oh, it isn't a great deal of difference.
Q. What is that?
A. It isn't a lot different.
Q. Your work is mainly performed on the inbound and outbound main line tracks, is it not?
A. Yes.
Q. And the switch tracks they pull those trains in on?
A. Yes.
Q. You never have been a switchman, have you, Mr. Johnson?
A. No.
Q. And you never have been a car repairman since the chains—the safety chains—and the posts were installed here on the west side of the wheel pit, have you?
A. No.
Q. The work you did was before that?
A. That's right.
Q. So, then, you never had any occasion to pass over the board here across the pit in the course of your employment after the claims were installed?

A. No.

Q. Now, you don't have occasion to work in the vicinity of this wheel pit every day or every week, do you?

A. No, just pass by.

[fol. 101] Q. And that is rather infrequently when you pass by, isn't it?

A. Oh, it happens frequently.

Q. Yes; once in a while you pass by?

A. Go by there every day several times.

Q. But you didn't stop there and loiter there, do you?

A. Right.

Q. You are a busy man, aren't you, Mr. Johnson; you have work to do in other parts of the yards, have you not?

A. Sometimes we are awful busy, then again we are not.

Q. That's right; and when you pass by this wheel pit, you are either going to a place of work to the south of the pit, or going to work beyond, to the north?

A. Most of the time, yes.

Q. You are either going to or from work. Now, you don't stop when you are there by the wheel pit to see what the switch crews are doing, do you?

A. In some instances, yes.

Q. Are you required to, under your employment, to stop there and observe the work of the switchmen?

A. No, but I may explain that.

Q. No, I am asking some questions about that. Do you stop? You are not employed to keep your eyes on the switchmen, see what they are doing?

A. No.

Q. And you have nothing to do with the switching operations in that part of the yards, have you?

A. No.

Q. And your job as flagman doesn't in any way concern the work of the switchmen?

[fol. 102] A. Doesn't.

Q. That is true; how long has it been since you were first informed that your presence would be required here at this trial?

A. Sir?

Q. How long has it been since you were first informed that your presence would be required here at this trial?

A. About a week.

Q. About a week; your name is Anders S. Johnson?

A. Anders G. Johnson.

Q. Well, will you come down here to look at a name on the back of this board, will ask you if that is your name appears there?

A. It is.

Q. Did you write it there?

A. I did.

Q. That was back in August 12 of this year?

A. Right.

Q. You may take the stand. Were you informed, then, you were going to be brought to Salt Lake to testify in this case?

A. No.

Q. Didn't know about that. Mr. Johnson, you never at any time, while you worked over in the wheel pit, remember an occasion where the board that crosses the pit here little distance to the west of the post was out of place?

A. It wasn't; it is permanent.

Q. But that board was just like the rest of the boards, isn't it?

A. It is, only it fits tighter.

Q. The other boards are removed by the men from time to time?

A. They are.

[fol. 103] Q. Are they all made alike?

A. Practically.

Q. Made of the same kind of wood?

A. Yes.

Q. Z-irons on the end?

A. Yes.

Q. And they are all made so that they will work interchangeably as coverings of the pit?

A. As far as I know; I haven't tried to exchange them, but they are practically the same.

Q. When the men cross the pit over the board, how do they—do they walk across it?

A. If the chains are down, yes.

Q. When the chains are down, all of the boards are across, aren't they?

A. That's right.

Q. How do they cross that pit when the chains are up?

A. They would have to crawl under the chains.

Q. No, I don't care about what they would have to do; if you have never seen them walk over, you can say that; maybe my question was little premature: have you ever

seen anybody, car men or anyone else, cross over the pit over the board immediately to the west of the post when the chains were up?

A. I don't remember.

Q. Well, would you say that you have or you haven't or do you have——

A. I would say no.

Q. You never have seen anybody cross over it?

A. No.

Q. But the board is there for people to cross over, isn't it?

A. Yes, and support.

[fol. 104] Q. Well, it may be, but the board is there so men can get across that pit, isn't it?

A. Yes.

Mr. Black: That's all, thanks.

Redirect examination.

By Mr. Bagley:

Q. Did you say you had seen car men go across the pit over this board, Mr. Johnson?

A. I seen them standing on there tightening up bolts and also as they go down, but——

Q. What were they doing when they were standing on the board?

A. Tightening up pedestal bolts with long-handled wrench.

Q. Now, I believe you stated in answer to a question from Mr. Black that it is your duty as a flagman——

A. That's right.

Q. —to put up blue flags?

A. Yes.

Q. Now, do you put up those blue flags—what is the purpose of putting them up?

A. The purpose is to protect the workmen and the employees that is working on the train.

Q. What do they mean? What does the presence of a blue flag mean?

A. It means that men is at work.

Q. And is anybody permitted or allowed to move a car or a train while those blue flags are up?

A. They are not.

Q. And do you also remove the blue flags when the car repairmen have finished their work?

A. Not on the drop pit.

[fol. 105] Q. You don't do that?

A. I don't do that on the 23 and 23½ tracks.

Q. Do you know who does do that?

A. The man that is working on the cars themselves.

Q. But the switchmen do not move those blue flags?

A. They do not.

Mr. Bagley: That is all.

Whereupon, EVERETTE WILLIAM ELLEDGE was recalled for further examination, and having been previously duly sworn, testified as follows:

Further redirect examination.

By Mr. McCarthy:

Q. Do you know when the safety chain posts and safety chains were installed on the wheel pit?

A. It was about May 1 of 1945.

Mr. McCarthy: That's all.

Further recross-examination.

Q. Is there a definite record anywhere available on that, Mr. Elledge?

A. I hardly think so; I don't believe there is.

Q. That's your memory, I take it.

A. That is as near as I know, I remember.

GEORGE P. HAWKINS, called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

Direct examination.

By Mr. McCarthy:

Q. Mr. Hawkins, will you state your full name?

A. George P. Hawkins.

[fol. 106] The Court: You better spell that last name.

A. H-a-w-k-i-n-s; 930 Acoma Street, Denver, Colorado.

Q. You are an employee of the Denver and Rio Grande Railroad?

A. Yes, sir.

Q. The trustees of that railroad?

A. Yes, sir.

Q. And you are employed as a car man?

A. Yes, sir.

Q. For what length of time have you been so employed?

A. Ten years.

Q. And during that time have you worked on the wheel pit at the Burnham yards?

A. For the last two years, yes, sir.

Q. For the last two years?

A. Yes, sir.

Q. What shift do you usually work?

A. Eight to four; eight A. M. in the morning to four P. M. in the evening, afternoon.

Q. And is that your usual customary working place?

A. Yes.

Q. At the wheel pit. Were you working there at the wheel pit or in the vicinity of the wheel pit at the time Mr. Wilkerson met with an accident?

A. Yes, sir.

Q. On July 26, 1945. Prior to—just prior to Mr. Wilkerson's accident, did you see or have any communication with Mr. Wilkerson?

A. Well, I was working on this pair of wheels and was just finishing the job up. I was standing on the inside, on the table inside the pit underneath the car, and I thought it was Mr. Wilkerson that asked me how soon it would be done. That was just a few minutes previous to the time [fol. 107] that we saw Mr. Wilkerson in the pit.

Q. And did you reply to his inquiry?

A. That it would only be a few minutes more.

Q. That was just prior to any accident that Mr. Wilkerson met with?

A. Yes, sir.

Q. And you were working in the wheel pit at that time?

A. Yes, sir.

Q. Who else was working in the wheel pit?

A. No one was in the pit at that time. My helper was in the high rail; the highrail is just to the opposite end of the pit.

Q. Just—is this what you refer to as the "high rail"?

A. Yes.

Q. Just south of the car?

A. Yes, sir.

Q. Where the inside of the tracks are lower there by——

A. It isn't as deep.

Q. It isn't as deep as the pit?

A. Yes, sir.

Q. By the way, what wheels of this car were spotted over the pit?

A. The center pair of wheels.

Q. That would be the center wheels of the south truck?

A. Yes, sir.

Q. Does this model accurately reflect how the car was spotted over the pit at the time you were working on it?

A. Yes, sir.

Q. After this conversation that you had, will you state what occurred after that?

[fol. 108] A. Well, I went ahead, finished up the job, and the finishing up part of it was just spreading the cotter keys. I had finished it all except that.

Mr. Black: What was that answer, please?

(Reporter reads the answer.)

A. So I came out from under, replaced the board just due west of the rail of 23½; that would be the west rail.

Q. Came out this side——

A. Yes, sir.

Q. —of the wheel pit; and this board, I take it from your testimony, was out. This board right next to the rail?

A. That board was out at that time, yes, sir. I replaced that and I set it on the board that is in place there now. I went over the chains and over to the oil vat which was located——

Q. Excuse me, at that time did you have occasion to step on this cover board?

A. Yes, sir.

Q. Cover board just west of the chains?

A. Yes, sir.

Q. You did step on it that time?

A. Yes, sir.

Q. And you came over the chains?

A. Yes, sir, and walked on just—cut across over to the oil vats, just located just west of the wheel transfer track.

Q. That would be over in this vicinity?

A. Well, it would be—yes, right between there and 24, approximately 35 feet.

Q. About in this vicinity?

A. Yes, sir.

Q. Between the wheel track and track 24?

[fol. 109] A. Yes, sir, and I was—walked back, or walked over there and I heard someone yell for help, so I runs back over here, and Mr. Johnson was already down in the pit with Mr. Wilkerson, and I didn't see Mr. Wilkerson go in the pit, but I don't know how he got there, but he was in the pit.

Q. When you climbed out of the pit—excuse me just a moment—withdraw that question. At the time you heard this—these moans, you were not in the pit at that time?

A. No, sir.

Q. You were over at the oil vats?

A. Yes, sir.

Q. Or oil bins, I think you referred to them. When you climbed out of this pit to go over to the oil bins, state whether or not you saw Mr. Wilkerson at that time?

A. Yes, sir, as I was cutting across diagonally, Mr. Wilkerson was coming down the west side of the pullman, and I passed, oh, within five or seven feet of him. I didn't speak to Mr. Wilkerson and he didn't speak to me.

Q. Mr. Wilkerson was travelling from the north to the south towards the pit?

A. Yes, sir.

Q. About how far was he from the pit at that time?

A. Oh, I would venture to say he was twenty-five feet.

Q. And how long was it after you saw him before you heard the moans?

A. Well, just shortly afterwards.

Q. Can you estimate the time?

A. Oh, I would say possibly three to five minutes.

Q. Now, when you climbed out of this—out of the pit and onto the cover board just west of the safety chains, you say you stepped on the board?

A. Yes, sir.

[fol. 110] Q. And what was the condition of the board at that time?

A. Well, the board was free from oil as far as I could see. It may—I have to keep that board in good condition because I use it at all times.

Q. You stepped on the board?

A. Yes, sir.

Q. And did it tilt or turn?

A. No, sir.

Q. Was it insecure or infirm?

Mr. Black: That calls for a conclusion.

Q. State whether or not it was infirm or insecure.

Mr. Black: I object to that as calling for his conclusion.

The Court: Well, he is asking for the observation of this witness with respect to such matter.

Mr. Black: Yes, I have no objection to that.

The Court: He may state what his observation was with respect to it.

Q. Will you state what your observation was with respect to——

A. It was firm. I didn't notice any looseness about it, or anything under it that would cause it to——

Q. What is your weight, Mr. Hawkins?

A. I weigh 250 pounds.

Q. And what is your height?

A. Six feet, two and a half inches.

Q. And during your work on this pit, do you have frequent occasion to use this board?

A. I use that board at all times when changing a pair of wheels.

Q. And just state what purposes you use the board for.

[fol. 111] A. The board sets just west of the post. The car that we raise and lower the wheels on sits straight. When it is spotted for 23½ to take a pair of wheels out, the board—the east side of the board—is straight up and down with the edge of the car, so we have to step on that, then up onto the rail of the car, which is approximately forty inches.

Q. Just go back just a moment; you said the east side of what?

A. Of the board that is located just west of the chains.

Q. East side of this cover board?

A. Yes, sir.

Q. What was your statement with reference to that?

A. The—that board, the east side of that board, is straight up and down with the railing of the car that we raise and lower the wheels on, and we have to step—there is a tool box there, too. Now, the mechanism to raise and lower this is located on the right-hand side of this car.

Q. That would be over under the pit?

A. No, it's just approximately on a straight line with that post, is the controls of that car.

Q. Straight line of this post?

A. Yes, sir.

Q. Under the car?

A. Well, it would be practically——

Q. Under this high rail?

A. No, sir.

Q. Will you step down and point where you mean?

A. Yes, sir.

(Witness steps down.)

A. The car sets right in here and the controls——

Q. That is the car on the hoist you refer to?

[fol. 112] A. Yes, sir; now, this would be under the direct line here. Now, the railing is directly under this. There is a tool box on this side, and we step on the tool box—step up on the rail—and then up onto the board on this edge right here to get in and out of the pit. Then, if we move the wheel over, my helper also uses this holder on this side; because we bring the wheels over here, and this section of rail moves up here, interlocks with this one, and that is the—we move wheels off, on and off. Then my helper changes his end of the car—his end of the car on this west section right straight up and down on this side of the car. He climbs out on the tool there, on the rail. Then he goes up over or under the chains, and that is the way we operate.

Q. Were you present, Mr. Hawkins, at the time various measurements were made of the dimensions of this wheel pit and the other objects shown by this model?

A. Yes, sir.

Q. And Mr. Elledge, was he present at that time also?

A. Yes, sir.

Q. And at the time those measurements were made, were the objects that were measured, and were the measurements that were made, were conditions the same as at the time when Mr. Wilkerson met with his accident?

A. Exactly; yes, sir.

Q. You were present in court yesterday when Mr. Elledge testified as to those measurements?

A. Yes, sir.

Q. Were the measurements which you made the same or different from those testified to by him?

A. They were the same.

[fol. 113] Q. And I refer particularly to the position of the chain posts and the cover board; were your measurements the same with respect to those objects?

A. Yes, sir.

Q. Now, Mr. Elledge, you work in this wheel pit—you say, you have worked there for the last two years?

A. Yes, sir.

Q. At the time you were working on the pit, what is the situation with reference to the chains?

A. The chains are never taken—never put up until the pit is uncovered. The only time we open that pit at all is when there is a car spotted for a wheel and when we uncover the pit, why then we put the chains on.

Q. During the time that you have been working there, state whether or not you ever observed any switchman or employees other than the car men cross the pit by going between the safety chain post and the car and over the cover board and out the same way on the other side.

A. No, sir.

Q. During the time that you have been working there, have you ever observed Mr. Wilkerson so cross the pit?

A. No, sir.

Q. By going between the chain post and the car?

A. No, sir.

Q. Now, referring again, Mr. Hawkins, to Mr. Wilkerson, at the time that Mr. Wilkerson fell into the pit, were you present when he climbed out of the wheel pit?

A. Yes, sir.

Q. Will you state the circumstances as to how he climbed out of the pit?

A. He climbed up the ladder and I was on the landing—that is, the board of the car. Mr. Johnson was in the pit. [fol. 114] Mr. Wilkerson climbed the ladder himself, and came out through the regular channels of opening, and he would have to come up the same way that I always come up to get out of the pit; that is, by using the tool box, the rail on the car, and the board.

Q. And at that time, state whether or not you made any inquiry of Mr. Wilkerson concerning his accident.

A. Yes, sir, I did; and Mr. Wilkerson told me he came under the chains——

Mr. Black: He, what?

A. —and his foot slipped.

The Court: Read the answer, Miss Reporter, if you will.

(Reporter reads the answer.)

Q. Mr. Hawkins, I show you what has been marked for identification as Defendant's Exhibit 4; will you state what this is?

A. That is the cover board that was in place the morning Mr. Wilkerson fell.

Q. Do you know how long this cover board was in use after that time?

A. It was up until sometime, I think in August, was when it was removed from the time of the accident; and, previous to the accident, it had been in use just in the condition it is now.

Q. Will you come right down and examine it?

(Witness steps down to the board.)

Q. Will you state whether or not, from your examination of the board, look at the other side of the board also, this side—this is the side that is up, isn't it?

A. Yes, sir.

[fol. 115] Q. You state whether or not, from your examination of that board, it is in all respects in the same condition as it was at the time Mr. Wilkerson was injured?

A. Yes, sir.

Q. Will you state, Mr. Hawkins, how that board fits over the pit?

A. That board fits just as you see it now; the pit runs east and west and the lip—the steel lip on this side—the steel lip on the other side fits closely against the wall—the concrete wall—and this board in particular is just a little bit longer than the other boards to make it just fit a little tighter because that board is also used as a brace; if I'm taking off a nut and a bolt breaks, why that board is the only thing to keep me from toppling over backwards into the pit.

Q. Times you have used it as a brace, was it in all respects suitable for that purpose?

A. Yes, sir.

Q. Is the board ever taken off the pit at all, Mr. ——

A. Not—it isn't—it is never removed. There is only one time that I have ever seen it removed, and that was when the pit was flooded, that we had to take—it had raised it. We had to remove it, then the water had forced it up to clean——

Q. How long before the accident was that?

A. That was after the accident.

Q. That was after the accident?

A. Yes, sir.

Q. Do you know of any occasion when it was moved before the accident?

A. No, sir.

Q. What would you estimate that that board weighs, Mr. ——

[fol. 116] A. Oh, I would say around seventy-five pounds.

Mr. McCarthy: You may cross-examine, Mr. Black.

Cross-examination.

By Mr. Black:

Q. Mr. Hawkins, this board will fit over the pit to any point that it might be placed, would it not?

A. No, sir.

Q. Only one place in the pit it will fit?

A. Yes, sir; that is when you cover the pit, the entire pit, those boards are made in different dimensions, and they have their special place to go.

Q. Well, is that because of irregulaties in the top of the pit?

A. Yes, sir.

Q. And the top of the pit is irregular?

A. Yes, sir.

Q. Come down to the box here and show the jury what you mean.

(Witness steps down to the jury box.)

A. There is two boards here—now, these boards here——

Q. That would be to the west of the west rail on the pit track?

A. That would be west of the wheel transfer track.

Q. I think the record indicates that that track is called, for the purpose of this case, the "wheel track"?

A. Yes, sir; all right.

Q. You are speaking of the space to the west of the west rail of the wheel rail, are you not?

A. Yes, sir; there is two boards in there that fit, and they come up snug and around this side of the rail. The same thing is here—the two boards fit to fill this gap snug against the rails here in order to close the pit. This board here is [fol. 117] about nineteen inches on the west of this. Now, this other one here has cut-outs to make it fit tight.

Q. That is on the east side of the rail?

A. Yes, sir, then there is another one that is about nineteen inches in diameter, that this board could not take its place.

Q. I will ask you my question: will the board you have in court fit over the top of the wheel pit at any point that it might be placed between the west rail of 23½ and the tie-ins, or in that neighborhood of the exhibit, directly east of the east rail of the pit track?

A. This board could be forced into here.

Q. In other words, it would fit in any of those places?

A. It is the same width, approximately. It might be a one-eighth of an inch longer board.

Q. Have you measured——

A. And except this one, now, this board here is west of the rail. It will not fit in that——

Q. Because that is made to accommodate the tie-ins?

A. Yes, that is too short—this board here is much shorter than that board and——

Q. Have you ever measured the length of this board from the vertical portion of the Z-iron on the outside to the similar portion of the Z-iron on the other side?

A. I never made it the point to measure it, no, sir.

Q. Never have measured it?

A. No, sir.

Q. Now, Mr. Hawkins, how does grease get on these boards?

A. Very little grease gets on that board. It's only from walking across the board.

Q. Well, grease——

[fol. 118] A. And me with my feet coming up onto that board, also my helper, we carry a lot of that grease up out

of the pit with us, but that is the only time that this grease gets on that board.

Q. Well, I am not interested particularly in times; I want to know how the grease gets on it; the grease comes out of the pit on you men's feet?

A. Yes, sir.

Q. Then when you have occasion to be on the board with your feet, why grease could well get from your feet onto the board?

A. Yes, if there is any grease on your feet.

Q. There is grease in the pit at all times, isn't there?

A. No, the pit is cleaned regularly, about once to twice a week.

Q. You clean it to get the grease out of it, don't you?

A. Yes, sir.

Q. And grease naturally accumulates there by reason of the work you men are engaged in, isn't that true?

A. Not necessarily; not unless there is an overflow of oil.

Q. Well, there is grease at all times in the bottom of the pit except right perhaps after it has been cleaned out; that is why you clean it out is to get the grease out?

A. There is possibly some oil there; it isn't actually a grease; it is an oil.

Q. Do you distinguish between grease and oil?

A. Well, I would say that grease was more of a compact nature than oil is.

Q. But you do—you men, of course, there can't be any question about bringing oil out of the pit onto the pit, and [fol. 119] that that oil oftentimes gets on the board?

A. Yes, sir, but it doesn't get onto that board to any great extent, as you see there.

Q. Why did you tell the jury it was to your advantage to keep oil and grease off the board?

A. It is to my advantage because if I get grease and oil on that board, I might take a tumble myself into the pit.

Q. If there was grease on the board, that might be a circumstance of danger, would it not?

A. It would be if there was any on there, yes.

Q. Yes; if there was oil or grease on there, that could well cause a man to slip and fall into the pit?

A. Yes, sir.

Q. Now, I take it, Mr. Hawkins, that whenever grease or oil gets on the board, that you men clean it off?

A. Yes, sir.

Q. And I take it that between the time that Mr. Wilkerson fell in the pit and the date that you and the other two gentlemen took the board off the top, which was August 12, 1946, that you had occasion to clean it many times, didn't you?

A. No, sir.

Q. Never did clean it?

A. Once there was a little oil on it.

Q. Once?

A. That I remember of in two years.

Q. What day and time and place was that?

A. Oh, I would say that was about eight months ago.

Q. Well, let's get what month, if we can, that *that*, you saw that little piece of oil on there?

A. I would say in February.

Q. Would you say in February, or is that your best opinion, it was in February.

[fol. 120] A. It must have been in February.

Q. Why do you say "it must have been"?

A. Because it was eight months ago, approximately eight months ago.

Q. You figure because it was eight months ago, it must have been in February?

A. Yes, sir.

Q. Was it in the middle, latter, or last part of February?

A. Middle part.

Q. Forenoon or afternoon that this little piece of oil was on?

A. It was in the morning.

Q. Was that such a strange occurrence that you made a mental note of it that that fact, that in one occasion in the morning, there was one piece of oil on there?

A. It is more or less strange occurrence because we are very careful on that.

Q. Did you become very careful after Wilkerson was injured, or were you very careful before?

A. No, sir, we were very careful all the time we were there.

Q. Why did you have to be careful?

A. It is to our advantage.

Q. Why do you have to be careful about oil?

A. Because we are working; we don't want to get hurt.

Q. You thought oil might invite an accident?

A. We don't want to invite an accident.

Q. How large a piece of oil or grease was that?

A. That was little oil, I would approximately say possibly a couple of tablespoonsful.

Q. Did that cause you to experience any alarm because you found a couple of spoonsful of oil on the board?

[fol. 121] A. Not any particular alarm because I cleaned it right up.

Q. You went right to work cleaning it up?

A. Yes.

Q. Was that thin, hard oil; what kind?

A. Thin oil.

Q. The circumstance was still so remarkable, you remember details of it?

A. I remember that—I remember every incident around the pit.

Q. During the two years, then, you have worked there, only time you ever saw any oil or grease on the board was on this morning about the middle of February, 1946?

A. That's right.

Q. Then there isn't any practice there, then, of keeping oil off the board, is there?

A. Not any general practice.

Q. Is there any practice at all?

A. Yes, there is a practice of keeping it off.

Q. And the practice has had one usage in the two years you have been there?

A. That's right because that is the only time the oil was there.

Q. Nobody ever told you to keep oil off the board?

A. Nobody in particular except at safety meetings it has been brought in.

Q. When safety meetings were held, was the matter of keeping oil off the board mentioned?

A. It was mentioned at this particular time.

Q. In February?

[fol. 122] A. Yes, sir.

Q. Did you report that you had discovered these two spoonsful of oil on that board in the early morning?

A. I didn't necessarily report it; there was another man that did report it.

Q. Another man reported it?

A. Yes.

Q. Did you get up and say that was the first time there had been any oil on that board in two years?

A. I did not.

Q. At any rate, whatever was said was of sufficient importance that the safety council thought there should be something done about keeping oil off the board, is that right?

A. That's right.

Q. What did they do about keeping oil off the board?

A. We cleaned it off any time it was on there, which is the one time I told you about.

Q. Make any record of the oil on the board at that safety meeting?

A. No, sir.

Q. Didn't do that?

A. No, sir.

Q. So, then, up to the time that Wilkerson was hurt, never had been any oil on the board?

A. Not to my knowledge, no, sir.

Q. That is what I am talking about, your knowledge. Then the board—the board, now, I suppose is in the same condition it was on the early morning of the middle of February, 1946, except the oil has been removed, is that right?

A. Apparently so, yes, sir.

Q. Doesn't it appear to you that this board is discolored [fol. 123] and shows the evidence of having seen a lot of oil on it during the years it has been a cover on that pit?

A. No, sir, not necessarily.

Q. You want to tell the jury now that there isn't any oil on that board?

A. Well, I couldn't say there isn't any oil on there; I could say there is no oil on it that would cause a man to slip.

Q. That is true because board — been well cleaned up?

A. Not to my knowledge.

Q. You cleaned it in February?

A. Not to my knowledge just in February, but there has been a lot of wheels changed since February.

Q. You don't get any oil on the board when changing wheels; you told the jury about that.

A. I told you that is true, but that pit has been uncovered many times since February.

Q. This board has never been off?

A. That is true; it has not been off.

Q. All right, let's go back to the first part: how did the oil get on the board?

A. The oil was spilled there.

Q. You don't mean to tell the jury all the evidence of oil appears on this board accumulated there on that early morning of February, 1946?

A. It possibly has accumulated since 1942 when it was first built.

Q. I see; but none has accumulated in the day shift since 1944?

A. Not that you could notice.

[fol. 124] Q. Is the board greasier or less greasy now than it was when you went to work down in the pit?

A. It is just practically the same.

Q. Practically the same?

A. Yes, sir; I would say there hasn't been a great deal of change.

Q. Haven't carried any oil off the board on your feet since that time?

A. I haven't carried any off; may have carried some on, but I don't know that I have.

Q. Now, you state to the jury that when you found Wilkerson there in the pit, that he told you he crawled under the chain, started to cross the board and fell in the pit, is that right?

A. He said he came under the chains; I didn't say he "crawled." I said he came under.

Q. All right, I am in error when — use — word "crawl"; he told you that he came under the chain and got on the board and his feet slipped?

A. Yes, sir, his foot slipped.

Q. His foot slipped and he fell off in?

A. Yes.

Q. Of course, you were interested in the cause of the accident at that time, were you not?

A. Yes, sir.

Q. And I suppose that you made a full and complete report of the matter of this statement he made to you?

A. Yes, sir.

Q. And you thought that that was the explanation of the occurrence?

A. Not necessarily; I couldn't see any grease that he had slipped on.

[fol. 125] Q. You thought the crawling under the chain, or coming under the chain, was an important matter, did you not?

A. Well, that is his—I have no right to forbid Mr. Wilkerson to come under those chains; I am not the foreman.

Q. You thought that the matter of him coming under the chain was important, didn't you?

A. Yes, sir.

Q. You remember an investigation held by your employer in Denver, Colorado in which you testified?

A. Yes, sir.

Q. You were there and testified, were you, before the committee?

A. Yes, sir.

Q. I will give you the date on it, that was at 12:45 P. M., October 19, 1945, is that right?

A. Yes, sir.

Q. And you were there as a witness?

A. Apparently it is; I have forgotten the date.

Q. And many representatives of the railroad company inquired of you about this occurrence, isn't that true?

A. Yes, sir.

Q. Well, now, how was it in that investigation you never mentioned in words or substance or effect that Wilkerson had ever told you that he came under that chain?

A. I believe it is in the record.

Q. If it is, let's find it.

(Hands book to the witness.)

The Court: How long is that report, Mr. Black?

(Discussion.)

Mr. McCarthy: We will agree it isn't in there, the statement.

Mr. Black: It isn't in there; I couldn't find it, I knew that. I will submit this to counsel, then look it over, Mr. [fol. 126] Hawkins.

The Court: You may examine it after you leave the witness stand.

Mr. McCarthy: The statement you asked for is not in that.

Q. Now, Mr. Hawkins, how long ago was it when you were first informed you would be called here as a witness?

A. It was last Tuesday, a week ago yesterday.

Q. Last Tuesday?

A. Yes, sir.

Q. Mr. Hawkins, is it your testimony now that a man the size of Mr. Wilkerson could not pass around between the post and the edge of a standard pullman car?

A. It could be done, yes, sir.

Q. Have you ever tried to do it?

A. Yes, I could do it.

Q. You can do it?

A. But it is at very bad discomfort to me; I have to bend my body, arch my body, in order to make it.

Q. You understand, of course, that the rails there of the pit, that they are built—placed on ties, are they not, and the rails on top of the ties

A. Yes, sir.

Q. You understand that the—your testimony is that agreeing with Mr. Elledge—is that the name, "Elledge"?

The Court: That's right.

Q. That the height of the post is forty-one inches?

A. Forty-two inches.

Q. Forty-two inches; and that there would be nine inches—or nine or ten inches, at least—between the top of the post and the bottom of the car.

[fol. 127] A. Yes, sir.

Q. And that the overhang of the car, the 31-inch overhang, is the overhang of the outside edge of the body of the car?

A. Yes, sir, on the pullman car, yes.

Q. On the standard pullman?

A. Yes.

Q. So, then, the post would be outward at least five inches from the widest part of the overhang?

A. Yes.

Q. And the widest part of the overhang would commence at a point about ten inches above the top of the post?

A. It would be somewhere around there, nine or ten inches.

Q. You are a larger man—you are much larger than Mr. Arbogast or Mr. Wilkerson?

A. Yes, sir.

Q. You are not going to tell this jury it would be any gymnastic accomplishment of any note for a man to pass around that post and the car?

A. It would be for me, yes.
Q. You were able to do it?
A. I can do it, I said, but——
Q. You can do it in spite of the fact——

Mr. McCarthy: Let him finish; he——
The Court: He should be permitted to finish his answer.

A. I said I could do it, but it would be at a discomfort to me to do it. It would not be an established practice,
Q. Well, — not talking about practice; we are talking [fol. 128] about possibility.
A. Well, there is a possibility, yes, sir; it could be done.
Q. You don't think Mr. Wilkerson had as much difficulty in doing it as you do?
A. Well, I don't know whether he would or whether he wouldn't. I never saw Mr. Wilkerson do it.
Q. Well, you weigh 250 pounds; Mr. Wilkerson weighs 145; it would be quite a lot of difference in the size——
A. That is true.
Q. —of the bodies of the men, wouldn't there?
A. That's true.

Mr. Black: That's all; thanks, Mr.——

Redirect examination.

By Mr. McCarthy:

Q. At the time of the formal investigation of this case, you say it was your understanding that you didn't so testify concerning what Mr. Wilkerson said?
A. Well, the investigation is quite hazy. It was held quite a while ago, and I couldn't say that they asked me for sure and swear to it, but I was under the impression that I gave that information.
Q. You made no effort to conceal that information?
A. No, sir.

Mr. Black: That's just—I object to the question, move the answer be stricken.
The Court: The question was suggestive and—however, it has been answered and——
Mr. Black: I move it be stricken.
The Court: Well, I think I will deny the motion in view of the fact that it has been answered.

[fol. 129] Q. You recall anyone asking you at the investigation as to what Mr. Wilkerson said to you when he came out of the pit?

A. No, sir, I don't recall anybody; as I say, the details were very hazy, and I don't recall anybody asking me that, but I was under the impression I gave that answer because that is a true story of the accident.

Mr. Black: That is a volunteer statement.

Q. You would have been perfectly willing to make an answer to that?

A. Yes, sir.

Mr. Black: No use in injecting——

The Court: If Mr. Black wants to make an objection, you should give him an opportunity to do so.

A. All right.

Mr. McCarthy: I think that's all.

Mr. Black: That is all, thanks.

Mr. McCarthy: Your Honor, we would like to recall Mr. Wilkerson for just two or three more questions on cross examination if we may.

Mr. Black: Not any objection at all.

Whereupon, CLYDE WILKERSON resumed the witness stand for further cross examination, having previously been duly sworn, testified as follows:

Further Cross-examination.

By Mr. McCarthy:

Q. Mr. Wilkerson, referring to the occasion when you went across the board and fell and were injured, as you began to cross that board, did you look at the board?

[fol. 130] A. I just glanced at the position of the board.

Q. You just glanced at it?

A. Yes, sir.

Q. At that time, did you see any grease on it that would cause you to slip?

A. I noticed one little spot of grease on it.

Q. Did you see any grease that you slipped on?

A. I don't know whether I slipped on that particular spot of grease or not at that time.

Q. Can you say whether or not you slipped on any grease?

A. I think I did.

Q. Mr. Wilkerson, I again call your attention to the deposition which was taken in Denver; you recall that, do you not?

A. Yes, sir.

Q. And you recall that your testimony there was given under oath?

A. Yes, sir.

Q. At that time were you asked these questions and did you make these answers:

Mr. Black: What page?

Mr. McCarthy: Page 16.

Q. "Q. Did you see a rock under the board?

"A. No, I didn't examine the board.

"Q. Did you see any grease on the board?

"A. There were some grease on the boards, yes, sir.

"Q. How much grease was on the board?

"A. I don't know anything about that."

A. I couldn't tell you how much.

Q. Were you asked those questions, and did you make that answer?

[fol. 131] A. Yes, sir.

Q. Was it true?

A. Yes, sir.

Q. It was true when you said, "I don't know anything about that, as to how much grease was on the board?"

A. Yes, sir, there was some grease on the board.

Q. At that time, also, were you asked this question—Page 21:

"Q. Now, before you stepped on the board from which you fell, I believe you said you just glanced at it?

"A. Yes, sir."

Did you make that statement?

A. Yes, sir.

Q. "Q. And did you observe any foreign substance of any kind on the board?

"A. There was some grease on it, but I didn't notice that I ever stepped into it, or whether I really got into the grease; that, I don't know, but I know that I slipped."

Were you asked those questions, and did you make those answers?

A. Yes, sir.

Q. And were those answers true?

A. As far as I know they were.

Q. And is that also your testimony at the present time?

A. Yes, sir.

Q. Were you also asked this question——

Mr. Black: Which page?

Q. "Q. But you did not step in any grease that caused you to slip?

"A. There was some grease on the board.

"Q. That isn't my question; my question was whether [fol. 132] your foot slipped in any grease.

"A. That I couldn't swear to right now."

Were you asked those questions, and did you make those answers?

A. Yes, sir.

Q. Were they true?

A. Yes, sir.

Q. Is that your testimony at the present time?

A. Yes, sir.

Q. At the time you stepped on this board, you say you stated—I believe yesterday—that it felt like it tipped or tilted?

A. Yes, sir.

Q. You don't know whether it did tip or tilt, did you?

A. The board felt to me like it *gived* and started my foot——

Q. As a matter of fact, you don't know whether you——

Mr. Black: I want to be sure the reporter got all of Mr. Wilkerson's answer.

The Court: She may read it.

(Reporter reads the answer.)

Mr. Black: He says something else, but I don't know what it was.

The Court: "It started my foot to slip." Wasn't that it?

A. Yes, sir.

Q. You don't know whether, as a matter of fact, the board tipped or tilted, do you? It felt like it?

A. It felt like the board give under my foot.

Q. But, answering my question, you don't know whether or not it in fact tipped or tilted?

A. Felt to me like there was something under it that [fol. 133] caused the board to tip or tilt under my foot.

Q. Now, refering to the time that you came through this space between the post and the car, coming from the south and going north, you said that was about an hour and a half before this accident to you?

A. Yes, sir, something in that neighborhood.

Q. At that time, did the board, when you went over the board, did it seem perfectly safe and secure?

A. It did at that time, yes, sir.

Q. Did not wobble or wasn't infirm?

A. No, sir, way I stepped on the board, the board seemed solid at that time.

Q. And that was the last time you went over the board about an hour and a half before the accident occurred?

A. Yes, sir.

Q. Mr. Wilkerson, what are these guard chains up here for in your understanding?

A. To keep people from walking directly into the open pit.

Q. Keep people from falling into the pit?

A. Yes, sir.

Mr. McCarthy: I think that's all.

Redirect examination.

By Mr. Black:

Q. Mr. Wilkerson, calling your attention to the deposition mentioned to you by Mr. McCarthy—and, gentlemen, I am reading from 16—did you not also testify in response to questions addressed to you by Mr. McCarthy, as follows:

"Did you see the grease on it after you slipped?

"A. I didn't pay any attention to it after I slipped. I didn't notice any grease before"—you got cut off——

"Q. You didn't see any grease on the board before you [fol. 134] stepped on it?

"I didn't see the grease, but there was some grease on it.

"You didn't see the grease you slipped on?

"A. No, sir.

"You didn't see any rock?

"No, sir.

"It just felt like that to you?

"It just felt like the board just gave enough to start enough tilting and it started my foot slipping."

That was your testimony then?

A. Yes, sir.

Q. After you started to slip, Mr. Wilkerson, your foot started to slip, will you describe what the movements of your feet were as they went out from under you?

A. The right foot slipped. I tried to catch myself on the edge of the board with my left foot and missed it.

Q. Movement rapid as the——

A. Yes, sir, very rapid.

Mr. Black: That's all.

Mr. McCarthy: That is all. That concludes the defendants' case.

CLYDE WILKERSON, recalled as a witness in rebuttal, having previously been duly sworn, testified as follows:

Direct examination.

By Mr. Black:

Q. Mr. Wilkerson, I will ask you to state whether or not you heard Mr. Hawkins' testimony to the effect that shortly after the accident, you told him in words or substance that [fol. 135] you came under the chain immediately before you fell; did you make any such statement to him at all?

A. No, sir.

Mr. Black: Then that's all.

Mr. McCarthy: That's all, your Honor.

Mr. Black: Mr. Arbogast, would you come forward, please?

GORDON H. ARBOGAST, called as a witness on behalf of the plaintiff, in rebuttal, having previously been duly sworn, testified as follows:

Direct examination.

By Mr. Black:

Q. Mr. Arbogast, can you tell us, if you know how many crews of car men worked the day shift there in the vicinity of the wheel pit?

A. Well, there is just one crew that works on passenger equipment on this particular pit.

Q. And that is the day crew?

A. Yes, sir, it consists sometimes of more than two men; that is, if they have a lot of work, but as a general thing, there is just two men.

Q. Do you know the foreman of that crew by sight or by name?

A. Well, I don't know as I would know the foreman. I don't think they have any foreman of the crew. There is just two men works on the pit there.

Q. Have you seen Mr. Hawkins there working as a member of that crew?

A. Yes, sir, I have.

[fol. 136] Q. During the period of time between the installation of these safety chains and posts and the time when Mr. Wilkerson was injured, I will ask you to state whether or not you ever passed over that board at the west of the post by passing between the post and the standing car while that crew was there working?

A. Yes, sir, I remember of two occasions that I passed through there.

Q. During that period of time?

A. Yes, sir.

Q. While the crew was working?

A. Yes, sir.

Q. Have you seen any other switchman working there in the yards act similarly; that is, go around the post, between the post and the car and pass over the board?

A. Yes, sir, I have saw my helpers at different times and before the chains were placed, we used the board at all times, you know, just to cross the pit. I have walked across the pit a number of times that way, and also my helpers.

Q. I am interested in the occasions when the board has been crossed after the chains were installed.

A. Yes, sir, I have saw— fellow by the name of Mason and fellow by the name of —— that helped me quite a long time.

Q. They were switchmen?

A. Yes, sir, that crossed the board.

Q. Crossed the board while car was standing over the wheel pit. Did they cross while a car was standing in the wheel pit?

A. Yes, sir.

Mr. McCarthy: I object to it, repetitious.

The Court: Objection sustained; he has answered the question, however.

[fol. 137] Mr. Black: That is all, thanks.

Cross-examination.

By Mr. McCarthy:

Q. How much do you weigh?

A. About 176 pounds, I would judge.

Q. How tall are you?

A. About six foot, two, I guess.

Q. Six foot, two?

A. Yes, sir.

Q. And you want this jury, Mr. Arbogast, to understand that you have crawled between this chain post and this car and held onto the posts and walk around there and step on the board and step out and catch the post on the other sidy? You want the jury to understand you have done that frequently?

A. Yes, sir, I have did it, emphatically, truthfully.

Mr. McCarthy: That is all.

Mr. Black: That is all, I may be through, but I want to ask Mr. Wilkerson a question. This is somewhat out of order; I would like to recall Mr. Wilkerson again if I might.

The Court: All right.

Mr. Black: Mr. Wilkerson, will you take the stand?

CLYDE WILKERSON, the plaintiff herein, was recalled to testify in his own behalf, he having been previously duly sworn:

Further redirect examination.

By Mr. Black:

Q. As I understood your direct testimony, you held the daytime switching job in the coach yards at all times between the installation of the chains and safety posts at the time you were injured?

A. Yes, sir.

[fol. 138] Q. Your shift was from seven in the morning until three in the afternoon?

A. Yes, sir.

Q. On that shift, did you have occasion to observe the car repair crew that were working in the pit?

A. Yes, sir, various times.

Q. Do you know Mr. Hawkins?

A. Yes, sir.

Q. Did you see him from time to time there working in the wheel pit?

A. Yes, sir.

Q. He was working from eight till four, as I understand it?

A. Yes, sir.

Q. I will ask you to state whether or not during the time I have called your attention, you have had occasion to pass over the pit by going between a standing car and the post, then crossing over the pit and out the other way, while this day crew was working?

Mr. Bagley: Object to that as repetitious, your Honor.

The Court: I think it is, but——

Mr. Black: Not on this repair crew, it is rebuttal evidence on——

The Court: If it is repetitious, it wouldn't make any difference, but just to save time, let him answer the question.

Q. Have you?

A. Yes, sir.

Q. Have you seen other members of the switching crew do the same?

[fol. 139] A. Yes, sir.

Mr. Black: That's all.
Mr. McCarthy: That's all.
Mr. Black: That is our case, your Honor, we rest.
Mr. McCarthy: We rest, your Honor.

(End of the evidence.)

[fol. 140] Reporter's Certificate to foregoing transcript omitted in printing.

[fol. 141] In District Court of Salt Lake County

Proposal for Settlement of Bill of Exceptions—November 7, 1946

Come now the attorneys of record for the plaintiff above named and propose and offer to the Court as Plaintiff's Bill of Exceptions in the above entitled cause the following: The transcript of the proceedings duly certified to by Joyce Richardson, the Official Court Reporter, contained in the within Bill of Exceptions on pages numbered from 1 to 138, both numbers inclusive, on the last page of which appears the Certificate of the Official Court Reporter, and the exhibits referred to in said Bill of Exceptions and identified by marks made by the Clerk as follows:

Exhibit 1, a Photograph of wheel pit,
Exhibit 2, Model of railroad car and wheel pit,
Exhibit 3, Map of railroad yard,
Exhibit 4, Cover board,
Exhibit 5, Photograph,

and copy of Defendants' Motion for Directed Verdict, a copy of Verdict, a copy of Judgment on Verdict, and a copy of the Order extending plaintiff's time within which to prepare, serve and file his Bill of Exceptions, and counsel certify and declare that said proposed Bill of Exceptions constitutes and sets forth accurately and completely all of the evidence introduced, proceedings had, objections made, exceptions taken, and orders, motions or rulings occurring,

noted or made during the trial of the above entitled case, and subsequent thereto.

Dated, this 7th day of November, A. D. 1946.

Rawlings, Wallace & Black, Attorneys for Plaintiff, 530 Judge Building, Salt Lake City, Utah.

[fol. 142] In District Court of Salt Lake County

Acknowledgment—November 13, 1946

Come Now the defendants, by and through their attorneys of record, and hereby acknowledge service upon them, on the — day of November, A. D. 1946, of Plaintiff's Proposed Bill of Exceptions herein, and said defendants, by and through their attorneys, do now hereby waive time within which to propose amendments to said Bill of Exceptions and consent that the said proposed Bill of Exceptions is in all respects true, accurate, correct and complete, he may settle and allow the same without further notice to the defendants.

Dated, this — day of November, A. D. 1946.

Farnsworth & Van Cott, Dennis McCarthy, Attorneys for Defendants.

11-13-46—12:00 noon Grant Bagley called and indicated no objection to bill of exceptions certificate being signed in its present form.

J. Allan Crockett, Judge.

[fol. 143] In District Court of Salt Lake County

Order Settling Bill of Exceptions—November 13, 1946

Honorable J. Allan Crockett, Judge of the Third Judicial District Court, in and for Salt Lake County, State of Utah, who sat as trial judge in the above entitled case, hereby certifies that the Bill of Exceptions proposed by attorneys for plaintiff, consisting of 148 pages, on page 138 of which appears the Certificate of the Official Court Reporter, Joyce Richardson, dated October 29, 1946, and the exhibits re-

ferred to in said Bill of Exceptions and identified by marks made by the Clerk as follows:

Exhibit 1, a Photograph of wheel pit,
Exhibit 2, Model of railroad car and wheel pit,
Exhibit 3, Map of railroad yard,
Exhibit 4, Cover board,
Exhibit 5, Photograph,

and copy of Defendants' Motion for Directed Verdict, a copy of the Verdict, a copy of Judgment on Verdict, and a copy of the Order extending plaintiff's time within which to prepare, serve and file his Bill of Exceptions, constitute and set forth accurately and completely all of the evidence introduced, excepting the evidence introduced with respect to injuries, pain, suffering and loss of wages, etc., which evidence was and has been omitted at the request of appellant, proceedings had, objections made, exceptions taken, orders, motions and rulings occurring, noted or made during the trial of the above entitled case, and subsequent thereto, and it appearing that the Bill of Exceptions was duly served upon attorneys for the defendants and the service thereof admitted on the 9th day of November, A. D. 1946, and that said defendants, by and through its attorneys had waived time within which to propose amendments thereto and have consented that said proposed Bill of Exceptions might be presented forthwith to the undersigned Judge without further notice to said defendants, and approved and settled by the Court in the event the Court shall be of the opinion that the said proposed Bill of Exceptions is in all respects true, accurate, correct and complete, and the Court being of the opinion that said Bill of Exceptions is in all respects true, accurate, correct and complete, the same is hereby settled and allowed as the Bill of Exceptions in the above entitled case.

[fol. 144]

Dated, the 13 day of November, A. D. 1946.

J. Allan Crockett, District Judge.

Attest: Alvin Keddington, Clerk, by Herman J. Hogensen, Deputy Clerk.

Filed after settlement on 13th day of November, A. D. 1946.

[fol. 145] IN THE SUPREME COURT OF UTAH

APPELLANT'S STATEMENT OF ERRORS RELIED UPON FOR REVERSAL—Filed February 15, 1947

Point I

The Court by its ruling denied plaintiff the right of trial by jury contrary to applicable and controlling federal statutes and decision.

Point II

There was substantial evidence that the plaintiff was engaged in the performance of his duties at the time he was injured.

Point III

There was substantial evidence that the place where plaintiff was injured was a work place, that it was unsafe, and that the unsafe condition was a proximate cause of plaintiff's injuries.

Point IV

The negligence of the plaintiff was not the sole proximate cause of the injuries suffered by him and to hold otherwise would be to revive the old doctrine of assumption of risk.

[fol. 146] IN THE SUPREME COURT OF THE STATE OF UTAH

No. 7017

CLYDE WILKERSON, Plaintiff and Appellant,

v.

WILSON McCARTHY and HENRY SWAN as Trustees of The Denver & Rio Grande Western Railroad Company, Defendants and Respondents

OPINION—Filed November 29, 1947

LATIMER, Justice:

Action for personal injuries which occurred July 26, 1945, as a result of plaintiff's falling into a wheel pit in the defendant railroad's coach yard at Denver, Colorado. The action was brought under the Federal Employers' Liability

Act, Title 45 U. S. C. A., Sec. 51 et seq. From a directed verdict of "No cause of action," plaintiff appeals. The parties will be referred to as they appeared in the trial court.

Plaintiff was employed as engine foreman in defendants' Burnham Yard at Denver, Colorado. His crew consisted of himself, two switchmen, an engineer and a fireman. Plaintiff's work consisted of general passenger car switching in the yard, making up trains, and spotting "bad order" cars for repairs.

The place of the accident was the wheel "drop pit," rectangular in shape, four feet two and one-half inches wide, and ten feet seven inches deep, with concrete walls, the top of which were flush with the level of the ground. This pit ran underneath three or more parallel tracks and was used by the pit men to change or make repairs to the wheels [fol. 147] and trucks of the various passenger cars of the defendants. The wheel pit lay with its long axis approximately east to west, and the tracks crossing it ran approximately north to south. The tracks which crossed the pit and which are concerned in this action were identified as the Wheel Track, which lay to the west, and on which the wheels were brought to and taken away from the pit; and Track Number 23½, which is the track over which cars would be brought to the pit for repair.

When in use, the pit was enclosed on three sides, north, south, and west, by means of four corner-posts and a connecting chain; and on the fourth or east side by whatever passenger car happened to be spotted over the pit for repair. Also, when the pit was in use, all the cover boards would be removed except one called the "permanent board" which always remained in place, and possibly another, which was located immediately to the west of and adjacent to the west rail of Track 23½. It was the permanent board from which the plaintiff fell, (and which is therefore the one of paramount concern to this case). This board was 22 inches wide, 4 feet 2½ inches long, and weighed 75 pounds. It was made up of several planks bolted together, and was located in such a position that its east edge was 9½ inches to the west of the chain posts nearest Track 23½. This board crossed the pit at right angles to the long axis and parallel to the rails of Track 23½. At the time of the accident, the cover board immediately adjacent to the west rail was in place, but it was completely covered over by

the overhang of the floor of the tourist sleeper then standing on the track.

To further describe the immediate scene of the accident, the distance from the west rail of Track 23½ to the near [fol. 148] edge of the permanent board was 45½ inches; the overhang of the car standing on the track was 31 inches; the floor of this car was a vertical distance above the ground of 44 inches; the east chain posts were 36 inches west from the west rail of Track 23½; and the east edge of the permanent board was 9½ inches west of the post nearest the track. The chain posts were 42 inches high. (These measurements are given to assist the reader in forming a picture of the space through which plaintiff squeezed in order to get onto the board from which he fell.) In other words, if a plumb bob were dropped vertically from the west side of the Pullman car to the ground, the horizontal distance between such line and the chain post nearest the car would be five inches at the ground, and would increase to approximately seven inches at the top of the post, because the post leaned slightly to the westward and away from the track. Other and wider types of passenger cars reduced this horizontal distance at the top of the post as much as two to six inches. When the pit was not in use, the posts would be removed from their sockets, the chains taken away, and the entire pit covered over by means of heavily constructed wooden boards similar to the permanent board, having angle irons or "z" irons at either end to make them fit snugly against the concrete edges of the pit.

At the time of his injury, plaintiff was seeking out a Mr. Hawkins who was employed by defendants as a car man, for the purpose of, to use the plaintiff's own words, "to see if he was through with this particular car so the car could be moved and I could go get another bad order car that I knew were in a hurry for and spot it for him . . ." Not seeing Mr. Hawkins anywhere, plaintiff proceeded south along Track 23½ and along the west side of the car, which was standing over the wheel pit, and started across the wheel pit, using the permanent board as a walkway. The safety chains were up at the time, and in order for plaintiff to cross [fol. 149] the pit he had to turn sideways and slide between the side of the car and the northeast chain post. He put his right hand on the top of the north chain post nearest the track, turned his body sideways so that he faced west, slid through the 5 to 7 inch space between the car and the

post and swung his body around the post. He then moved a few inches to the west along the north edge of the pit, placed his right foot onto the permanent board, and thereupon fell off the west side of the board into the pit, sustaining the injuries complained of.

Plaintiff was not required by the necessity of finding Mr. Hawkins to cross the wheel pit at all. He could have gone around the pit, an added distance of forty-odd feet; he could have observed whether the blue flag had been removed from the track; which would have indicated the work was finished and the car was ready to be moved; or else he could have stopped at the north side of the pit and called out for Mr. Hawkins or his helper and obtained the desired information that way.

Plaintiff testified that when he crossed this same board about an hour and a half before the accident, he observed some grease or oil on the board; and that at the time of the accident he felt as if his foot slipped. The evidence was that the car men coming up out of the wheel pit would track some grease and oil onto this board, and further, that defendants had not cleaned off the board for the past eight months prior to the accident, though they did clean out the bottom of the pit once or twice a week.

Plaintiff testified that prior to installation of the safety chains it was the practice of the men working generally in the yard to cross the wheel pit by means of the permanent board, and that there was no change in this practice after the chains were put up, other than that the men had to go [fol. 150] around the post and between it and the side of the car standing on the track. Plaintiff further said that he had never received any instructions forbidding him to cross the pit in this manner. However, the testimony in regard to the claimed practice of employees going between the posts and the cars was directly contradicted by Elledge, the general car foreman; by Hawkins, the car man working at the pit; and by Johnson, a flagman, all of whom testified that, since the chains were put up, they had never seen anyone other than the car men working in the pit cross the pit by means of the permanent board.

Much has been said in recent cases about the lengths to which the Supreme Court of the United States has gone in requiring submission to the jury of cases arising under the Federal Employers' Liability Act. And much has been said about how a failure to submit a case to the jury deprives

plaintiff of a constitutional right. Illustrative of how far one of the Federal Courts has gone in its analysis of the recent decisions of our highest court is the following quotation from Griswold v. Gardner, (C. C. A. 7), 155 F. 2d 333, 334:

> "The Supreme Court, commencing with Tiller v. Atlantic Coastline R. Co., 318 U. S. 54, 63 S. Ct. 444, 87 L. Ed. 610, 143, A. L. R. 967, in a succession of cases has reversed every court (with one exception hereinafter noted) which has held that a defendant was entitled to a directed verdict. In the Tiller case, the Supreme Court reversed the Court of Appeals for the Fourth Circuit, 128 F. 2d 420, which had affirmed the district court in directing a verdict. The case, upon remand, was again tried in the court below, where a directed verdict was denied. For this denial the Court of Appeals reversed, and again the Supreme Court reversed the Court of Appeals, holding that the district court properly submitted the case to the jury. In Tennant v. Peoria & P. U. R. Co., 321 U. S. 29, 64 S. Ct. 409, 88 L. Ed. 520, this court reversed the district court on account of its refusal to direct a verdict, and our decision, 134 F. 2d 860, was reversed by the Supreme Court. In Bailey v. Central Vermont Ry., 319 U. S. 350, 63 S. Ct. 1062, 87 L. Ed. 1444, the [fol. 151] Supreme Court of Vermont held that there should have been a directed verdict for the defendant, and the Supreme Court reversed the decision of that court. In Blair v. Baltimore & O. R. Co., 323 U. S. 600, 65 S. Ct. 545, 89 L. Ed. 490, the Supreme Court reversed the Supreme Court of Pennsylvania which had held that there should have been a directed verdict. In the recent case of Lavender, Admr., etc., v. Kurn, et al., 66 S. Ct. 740, the Supreme Court reversed the Supreme Court of Missouri which had held that there should have been a directed verdict for each of the defendants."

There are, however, at least two good reasons why the statements set forth in the foregoing opinion are not persuasive in this case. The first is, consideration has been given only to those cases wherein the Supreme Court granted certiorari; and the second is, that in all those cases,

the Supreme Court re-affirmed its holding that plaintiff, in order to recover must still show negligence on the part of the employer.

In two of the latest pronouncements by that court, the rule requiring plaintiff in a suit based upon the F. E. L. A. to establish negligence of the employer, is re-affirmed. In Ellis v. Union Pacific R. R. Co., 91 L. Ed. 433, 435, decided February 3, 1947, reversing 146 Neb. 397, 19 N. W. 2d 64, is found the following quotation:

> "The Act does not make the employer the insurer of the safety of his employees while they are on duty. The basis of his liability is his negligence, not the fact that injuries occur. And that negligence must be 'in whole or in part' the cause of the injury. 45 U. S. C. A. Sec. 51; Brady v. Southern Ry. Co., 320 U. S. 476, 484, 88 L. Ed. 239, 245, 64 S. Ct. 232. Whether those standards are satisfied is a federal question, the rights created being federal rights. Brady v. Southern Ry. Co., supra; Bailey v. Central Vermont R. Co., 319 U. S. 350, 87 L. Ed. 1444, 63 S. Ct. 1062."

In Jesionowski v. B. & M. R. Co., decided January 13, 1947, 91 L. Ed. 355, 358, 15 Law Week 4159, reversing 154 F. 2d 703, the Court said:

> ". . . Thus, the question here really is not whether the application of the rule relied on fits squarely into some judicial definition, rigidly construed, but whether the circumstances were such as to justify a finding that this derailment was a result of the defendant's [fol. 152] negligence. We hold that they were."

While the Ellis case, supra, holds that whether or not the standards of care required of an employer are satisfied is a federal question, it does not hold that a trial court is precluded from directing a verdict where there is no substantial evidence in the record to show the employer has not satisfied the standards of care required of him.

If we follow the rule set out in the case of Brady v. Southern Ry. Co., 320 U. S. 476, 64 S. Ct. 232, then we must determine from the record whether or not there is more than a scintilla of evidence of defendant's negligence. If there is, then the court erred in directing a verdict; otherwise, it did not.

The record indicates the following factual situation in regard to whether or not the plank was a "place to work" for the plaintiff. For some time prior to the first day of May, 1945, the wheel pit had not been enclosed with chains, and, according to plaintiff's witnesses, the employees of the defendants working in the yard were accustomed to use the permanent board as a footpath across the pit. While the record is silent as to the following, it can be reasonably inferred that prior to the time the chains were put up, the pit was a hazard to both employees and other persons who might be passing through that area. Even plaintiff conceded in his testimony that he thought the chains were placed around the pit to keep people from falling in. Prior to the time the pit was enclosed the testimony indicates a custom was prevalent on the part of the switchmen and pit crewmen to walk across the board, and the evidence may be adequate to show this custom was of sufficient notoriety, and indulged in over such a length of time as to charge defendants with knowledge of its existence. However, defendants, nearly three months before the accident, attempted to stop [fol. 153] this practice by enclosing the pit. This is not the case in which an employer attempts to stop an unsafe practice by publishing written notice to employees to discontinue. No rules or regulations to prohibit the practice were promulgated. Instead, the defendants adopted a different, and we think a more effective method of notifying the employees generally in the yard to stop the practice of crossing the wheel pit. They blocked the path.

If, as indicated by the testimony, the employees of defendants were using the plank as a crosswalk, prior to May 1, 1945, was the erection of the guard chains and posts on or about that date notice to those not working in the pit that the plank was no longer thereafter to be used as a pathway? And, if the chains were notice to switchmen and to the plaintiff, was the fact, if it be a fact, that switchmen were ignoring the barricade and continuously disregarding the purpose of the chains, directed to the attention of the defendants? These questions must be answered to properly determine defendants' negligence, for the reason that negligence in not furnishing plaintiff a safe place to work is dependent in part upon whether defendants could reasonably except plaintiff to use this plank in carrying out his duties. Some types of work are inherently dangerous, and require considerably higher safety standards than

do others, and an employer must bear this in mind in maintaining the premises where workmen are required to be. In this particular situation, if the defendants could have reasonably anticipated that switchmen were going to use the method adopted by plaintiff in crossing the pit, the erection of the chains, rather than being a safety measure, would have been negligence, as the chains did in fact make the crossing of the pit, by means of the board, more hazardous. It required the employee to depart from a straight course, swing himself through a narrow space of five to [fol. 154] seven inches, step over at least a 9½ inch open space, and approach the board from an angle that would have a tendency to cause a man to slip and fall.

To hold that the defendants did not intend to close off the plank as a place to work for employees generally would be to accept a most unreasonable inference. In treating the question of notice to appellant, the following facts are significant. It was not necessary for appellant at the time of his injury, or for aught that appears, at any other time, to use this particular pathway. Other and safer routes were open to him. The construction of the enclosure was such that with a standard tourist car there was not to exceed seven inches in clearance between the overhang of the car and the guard post. On wider cars, the clearance was less. To an ordinary reasonable person it was obvious that the railroad company had intended to close this pathway to all traffic crossing the pit. There just would not be any sense or logic in forcing plaintiff to go to the extent of literally squeezing himself between the post and car if it were intended to permit his continued use of the crossing. Chains running parallel with the plank might have been helpful, but chains running at right angles to the plank could be of no assistance, rather they would be an extra hazard.

The evidence quite conclusively shows that the board had its place in the scheme of things in the repair yard, and that its principal purpose was for the use of the pit crew. The members of this crew had to use it to get from one side of the pit to the other, and had to use it to get down into and out of the pit. Besides, they used it as a brace when doing certain kinds of work. Most of the use was while they were working in the pit, although the evidence is susceptible of being interpreted to the effect that the pit crew used the board for crossing the pit inside of the chains. Even though the latter use be conceded, such use does not

[fol. 155] extend to all other workmen in the yard. A pit man may be required to cross a plank to get into or across the pit, and a brakeman may be required to climb a ladder to get onto a car, but neither of these means should be used except by those employees whose duties reasonably require their use. And particularly they should not be used when they unreasonably increase the risk to be encountered by the employee. In this particular case, the board appears adequate for the use of the pit crewmen, but entirely inadequate if intended to be a crosswalk for other employees. Employees climbing in and out of the pit approach more deliberately, use other and different hand holds, and are more careful of their footing, while employees swinging on to the plank in a hurry are apt to forget about the slippery condition of an oily board and forget about the dangers incident to crossing, as did the plaintiff, who swung himself around the chain post and onto the plank. Defendants must have appreciated the dangers of an open pit with an unguarded passageway across it, and have installed the safety chains to warn employees of the danger. Had they not intended to preclude the use of the board as a walk-way, the defendants would not have installed the chain posts so as to block an open straight approach to the board. Accordingly, we hold that the installation of the chain and posts was notice by defendants to all employees generally in the yard that the board was not to be used as a walk-way for crossing the pit.

Such being the case, did plaintiff's evidence establish a subsequent use of the board for a crosswalk by carmen in such a manner as to charge defendants with notice that it was being so used? We think not. The evidence as to the custom and practice of switchmen going between the chain [fol. 156] post and the side of the car came from the testimony of five witnesses. The three witnesses for defendants testified that they worked either in the pit or in the vicinity of the pit, over extended periods of time, and that they had never seen anyone other than pit crewmen cross the pit by means of the board after the chains were put up. This evidence given by witnesses for defendant is not referred to for the purpose of suggesting that this court is reconciling the dispute, if any. It is referred to solely for the purpose of showing that defendants' evidence in no way added to that produced by the plaintiff.

The plaintiff and one witness called by him testified in regard to the use of the board as a pathway, and the following is the record of their testimony. Plaintiff testified as follows:

"Q. I will ask you to state whether or not you observed any practice with reference to crossing over the pit when men were working on the cars there in the daytime before these chains were installed?

A. Walked right straight across the board.

Q. Was there a board usually there to walk over?

A. Yes, sir.

Q. Was there any change in that practice after the chains were installed?

A. None, only they had to walk around the chains.

Q. At any time while you were working in the yards there before you were injured, did you ever receive any instructions from anyone forbidding you to cross over the pit.

A. No, sir.

Q. You may state whether or not you observed men cross over the pit as you have indicated here on more than incidental occasions.

A. Yes, sir.

Q. What did you observe with reference to the number of times the occasion when men would cross over the pit.

A. Oh, I couldn't say; I suppose maybe a hundred times; varies, men, both switchmen and car men or others working there in the yard necessary; pullman employees and so forth.

Q. Crossed over the pit?

[fol. 157] A. Yes, sir, it was a common practice for everybody to use that that way."

It will be noted from this testimony that it is in no way limited as to dates or employees. The witness could have been talking about the time before the chains were installed, the time after the chains were installed, or both. If we assume the most favorable version to the plaintiff, this would establish the time as after the chains were installed, but there is no way of telling how much of the use must be credited to the car or pit men, who were constantly using the

board in connection with their duties, and how much of the use was chargeable to the switchmen.

The other witness for plaintiff, Arbogast, testified as follows:

"Q. During the period of time between the installation of these safety chains and posts and the time when Mr. Wilkerson was injured, I will ask you to state whether or not you ever passed over that board at the west of the post by passing between the post and the standing car while that crew was there working?

A. Yes, sir, I remember of two occasions that I passed through there.

Q. During that period of time?

A. Yes, sir.

Q. While the crew was working.

A. Yes, sir.

Q. Have you seen any other switchman working there in the yards act similarly; that is, go around the post, between the post and the car and pass over the board?

A. Yes, sir. I have saw my helpers at different times and before the chains were placed, we used the board at all times, you know, just to cross the pit. I have walked across the pit a number of times that way, and also my helpers.

Q. I am interested in the occasions when the board has been crossed after the chains were installed.

A. Yes, sir. I have saw a fellow by the name of Mason and fellow by the name of —— that helped me quite a long time.

Q. They were switchmen?

[fol. 158] A. Yes, sir, that crossed the board.

Q. Crossed the board while car was standing over the wheel pit. Did they cross while a car was standing in the wheel pit?

A. Yes, sir."

An examination of this evidence shows the witness could identify two switchmen who crossed the plank during the three months period, but it is entirely lacking in those elements necessary to show acceptance of a custom or practice by acquiescence. The use by employees other than the two is confused between the times before and the times after the installation of the safety chains.

This case is analogous to a case involving the doctrine of waiver of a rule by non-enforcement, and a similar principle of law is involved. Here the employer has furnished a reasonably safe place to work, but is charged with negligence because it has failed to prevent a claimed practice which rendered an otherwise safe place, unsafe; the employer being charged with knowledge of the disregard of his warning chains, because of the notoriety with which the employees have used the plank after the erection of the guard chains, and the length of time the practice has been in vogue. To impose this duty on the employer, the board must have been used as a place to work by others than the pit crew, so openly and habitually and for a long enough period of time to raise the presumption that the defendants or those appointed by them had consented to the use or acquiesced in it. If the trial court could say, as a matter of law, that plaintiff had failed to establish, by any substantial evidence, either the time or the notoriety element, then the directed verdict was proper. In the present instance the chains and posts enclosure had been erected and in use approximately [fol. 159] three months. The pit was completely covered when not being used by the pit crew and during the covered period the planks could have been used as a walkaway with safety. The pit crew was required to use the plank to get from one side of the pit to the other, so the use of it by the pit crew while working in the pit would not be notice to the defendants that the plank was being used by other employees. The only period that plaintiff could rely upon to show use would be the time when the pit was uncovered and the posts and chains in place, and the practice would be limited to the use of the board as a walkaway. The evidence of plaintiff, at the most, established a questionable, sporadic and occasional use of the board in the manner contended for by him, and for a short period of time. This is not sufficient to charge the appellants with notice of the unsafe practice. The evidence falls short of that required to establish a presumption that the defendants had consented to or acquieseed in the improper use of the board as a pathway. There must be a limit beyond which the employer need not go to protect the employee. If not, then the erection of barricades, the construction of safety devices, and other protective measures do not assist in relieving the employer from liability. They add additional burdens upon him. If he erects one or many, he must, at his peril, see

that the employees do not disregard its purpose or their purposes. Failing to do this, he becomes negligent, not because he has failed to provide a safe place to work, but because the employees pay no attention to the safety devices furnished for their protection. While we hold an employer must use reasonable means to protect employees, when, as here, an effective measure has been taken to close off a walkway over a pit to a class of employees, before one of that class can disregard the warnings and recover for injuries sustained while using the closed area, the evidence of consent or acquiescence in the use by the employer must be substantial that the period of use, in the manner con- [fol. 160] tended for, was of such duration and the use so habitual and of such notoriety that a reasonably prudent employer could be presumed to have consented to the use. The record fails to disclose sufficient evidence to meet the requirements.

Plaintiff sets out three separate grounds as to why he claims the premises were unsafe. Firstly, that the defendants caused a loose plank to be set over the wheel pit, and due to its insecurity the plank turned when plaintiff stepped on it. Secondly, that defendants caused plaintiff to pass over over the wheel pit and at a time when the plank was insecurely attached to the sidewalls. Thirdly, defendants permitted grease and oil to accumulate on the plank, and this, together with the narrowness of the plank, caused plaintiff to slip and lose his balance.

With respect to plaintiff's first and second specifications of defendants' failure to provide him with a safe place to work, the court was not in error in holding against the contention of the plaintiff, as there was not sufficient evidence to submit these questions to the jury. Plaintiff was the only witness who gave testimony on the insecurity of the board, and even he made no claim that the board was improperly constructed, so as to be insecure. The substance of plaintiff's testimony on these two specifications was that the plank felt to him like there was a little rock or gravel which caused it to tip. That he was guessing about the rock and gravel, but it felt like it tipped or tilted. However, he had gone across the plank approximately 1½ hours before, and at that time it was solid. Other witnesses testified to the construction of the board, and the manner in which it was affixed to the sides of the pit, and all agreed that the board fit firmly and there was no play in it. That the permanent

board was for the use of the pit crewmen, and was used as a brace by them while working on the cars.

[fol. 161] One witness who worked in the pit testified that he heard someone yell for help, and he immediately went down into the pit to assist him. That he used the board to climb out of the pit within three to five minutes after the plaintiff's fall, and that it was firm and secure at that time. Plaintiff and his witness, Arbogast, further corroborated the testimony of the other witnesses by their statements that they had used this board as a pathway. Their testimony is silent as to the insecurity of the board at these other times. When this evidence is considered together with the board itself, which was introduced as an exhibit, and the photographs of the pit showing the board in place, it can be definitely stated that plaintiff's guess as to the tipping was not sufficient to raise a reasonable inference of any insecurity of the board.

The other specification of negligence presents a much more difficult problem and directly relates to the previous discussion of what constitutes a "place of work" for plaintiff.

The reason for discussing defendants' knowledge, either actual or constructive about the use being made of the plank, is for the purpose of determining whether the maintaining of a 22-inch board for a walkway, which is almost certain to become greasy or oily, constitutes negligence. It must be conceded that if defendants knew or were charged with knowledge that switchmen and other workmen generally in the yard were habitually using the plank as a walkway in the manner claimed by plaintiff, then the safety enclosure might be entirely inadequate, and a jury question would have been presented on the condition of the board and the adequacy of the enclosure.

It seems inconceivable that the defendant company would construct a safety chain and block the use of a pathway only to increase the danger to part of the personnel expected to [fol. 162] use the plank. The eastern posts were placed as close to the track as was reasonably possible, and plaintiff had to do the unusual to discover a way to get hurt. To require an employer to furnish a place to work so safe that an employee by his own acts cannot render it unsafe, is placing an unreasonable burden on the employer. This would in effect make the master the insurer of the safety of the servant.

While the law requires the employer to furnish the employe with a safe place to work, it does not require that the master be an insurer of the safety of the servant, and maintain every "place of work" safe from negligent use by every employee. The cases cited by the plaintiff do not so hold. Thompson v. Boles, 123 F. 2d 487 (a case in which a brakeman fell from a bridge because of a defective railing); Bailey v. Central Vermont Ry. Inc., 319 U. S. 350, 87 L. Ed. 1444 (an employee tipping a car of coal on a trestle); Boston & M. R. R. v. Meech, 156 F. 2d 189 (an employee stripping an engine on a washstand); Ellis v. U. P. R. R. Co., 91 L. Ed. 433, supra (in which an employee was killed because of an impaired clearance); Lavender v. Kurn, 66 S. Ct. 740 (a switchman hit by a hook swinging from a car); Eglsaer v. Swandrett, 151 F. 2d 562 (engineer falling from catwalk). In all these cases, the employee was performing his work at a place where the master had or was charged with knowledge that the servant would be. That being so, the employer must make the premises safe for those particular purposes. In this case, the defendants had no knowledge, actual or constructive, that switchmen were using the plank to carry out their tasks, and therefore, they were only required to keep the board safe for the purposes of the pit crewmen. This is not the case where the employer is charged with notice that the employee will work at the place frequently or infrequently. This is instead the case in which the employer has no reason to suspect that the [fol. 163] employee would disregard obvious warnings and negligently cross the plank from which he fell and was injured. The evidence in this case fails to disclose that the employer was chargeable with notice that the switchmen would use the plank for a walkway. Accordingly, the standard, we hold, required of the defendants in this case, was to furnish a board safe for the purposes of the pit crewmen, and not for all the employees in the yard. With this standard in mind, neither the narrowness of the board nor the presence of a small amount of grease would present a question of negligence, as to this plaintiff. The board was wide enough for all purposes for which it was intended and with pit men repeatedly getting up onto the board from down in the pit, it would be almost a physical impossibility to keep the board continuously free from oil and grease.

In the case of Boston & Maine R. R. v. Meech, supra, the U. S. Supreme Court denied certiorari and, in effect, placed

its stamp of approval on a holding of the 1st C.C.A. that the master was negligent because other reasonable safety precautions could have been taken to protect the employees. The holding in that case must be considered in the light of the facts of the case. Applying the same rule to the case at hand, it is difficult to see how defendants could have adopted other reasonable measures that would have afforded more protection to this plaintiff. The chains indicated a closed area; the hazard was readily apparent; the warning sufficient; visibility was unimpaired; plaintiff was familiar with the width, location, and depth of the pit; the condition of the board was known to the plaintiff; there were no latent defects to ensnare him; if the board had any grease on it, plaintiff knew of this fact, as he claims to have seen the presence of a small amount some 1½ hours before his fall; there was no trap to mislead plaintiff, and for all practical [fol. 164] purposes, the gateway across the pit was closed.

Plaintiff's counsel has suggested some additional measures defendants might have taken but none of these would have added to plaintiff's protection. Two of these will be referred to. Had the chains been taken down as suggested by counsel, a safer place would not have been the result; instead, the result would have been the opposite. Also, a sign not to cross would have afforded plaintiff no additional security or warning, for he disregarded the chain and he would not doubt have ignored another form of warning. Other suggested measures might be discussed, but with little purpose. No case has yet been published wherein an employer has taken every conceivable precautionary measure to protect the employee and it is doubted that any such case will ever be reported. The burden on the defendant in this case must be kept within reason, and, from the record before us, we think the jury could have come to only one conclusion, and that is, that the defendants had discharged their duty to the plaintiff in this case by furnishing him a safe place to work. Such being the case, the trial court did not err in directing a verdict for the defendants.

The judgment of the court below is affirmed, with costs to respondents.

We concur:

Roger I. McDonough, Chief Justice; Eugene E. Pratt, Justice; James H. Wolfe, Justice.

WADE, Justice (dissenting:)

I dissent. My disagreement with the prevailing opinion is very largely on the construction which we should place [fol. 165] on the undisputed facts, and on the inferences which should be drawn from the evidence of a continuing use of the permanent board. The basis of my discussion of these problems will be the facts as stated in the prevailing opinion. For although those facts are not stated unduly favorably to the plaintiff yet they are sufficient for the points which I wish to make.

First as to the construction to be placed on the placing of the chains around the wheel pit. I do not think our problem is to determine what was the intention of the defendants in placing the chains as they did in that position. Our problem is rather to determine what should the defendants have anticipated would be the effect of thus placing the chains, on their employees who had in the past been using the permanent board to cross from one side of the pit to the other when the pit was open. What the defendants' intention was in so placing these chains is immaterial, the same as any other unexpressed intention which they may have had. The only thing we are concerned with is what intention did they communicate to the plaintiff and their other employees by such act. In other words since they did not expressly by oral communications or by any written statement indicate to the plaintiff and other employees that they were no longer to use this board in crossing the pit when it was open, could they reasonably anticipate that the mere placing of those chains around the pit in the manner which they were placed would be sufficient to cause the plaintiff and other employees similarly situated to desist from using that board in crossing the pit in cases where to do so was the most convenient way to get where their work required them to go.

In determining what was the intention of the defendants [fol. 166] in placing the chains around the pit the prevailing opinion points out that it would be more dangerous for plaintiff to pass around the post and between it and the car, and back on the permanent board and then on across the pit, with the chain there as it was placed, than it would be for him to merely walk across the board without any chain. This would have some weight in determining what were defendants' intention in placing the chain there,

but it has very little bearing in determining what should the defendants reasonably anticipate would be the effect thereof on plaintiff and other employees similarly situated. While we cannot presume that defendants would intentionally change the situation so that it would be more dangerous for plaintiff to perform his work we can infer from the facts that such was the effect of so placing the chain around the pit. And while they may have intended by placing the chain around the pit to notify plaintiff and other employees similarly situated not to use the permanent board in getting from one side of the pit to the other, still we may conclude that defendants should have known that it would not be an effective means of giving such notice. Of course the placing of the chain around the pit did have the effect of preventing someone from falling into the open pit at other places where it was not covered by the permanent board.

The evidence is undisputed that before the chain was placed around the pit, plaintiff and his crew and other employees similarly situated, when the pit was open, used the permanent board regularly to cross from one side thereof to the other; that at times their work required them to go from one side of the pit to the other and this was the most convenient way to do so; that when the pit was closed, both before and since the chain was placed around it, such employees have regularly walked over the boards which covered it including the permanent board; that no one has ever [fol. 167] told plaintiff that he was expected not to use this board in crossing over the pit nor has he ever been so notified in writing. The permanent board is 22 inches almost two feet wide, it weighs 75 pounds, it consists of three heavy planks firmly bolted together and it fits firmly in a groove made therefor on the sides of the pit. It gives ample room for a person to walk across it and its appearance would suggest that it was put there for that purpose. The prevailing opinion suggests that it would only be 40 feet further to go around the pit, to have to go that much farther would seem to a man busy at work too far to go around when he could get where he was going merely by stepping over or stooping under a chain or by swinging around the post as plaintiff did. It is also clear that the men working in this pit regularly used this board in crossing from one side thereof to the other. Under these circumstances, since the danger in doing so without stopping to consider the possibil-

ities is not apparent, and since human experience teaches that busy men do often take such chances, in my opinion the defendants had they acted as ordinary, prudent men, would have anticipated that the plaintiff and the other employees who were similarly situated would continue to use this board to cross the pit just as they had used it before the chain was placed there. To me it seems that this is the thing that you would naturally expect them to do.

This is not exactly the negligence which plaintiff pleaded. But the evidence of such negligence was supplied by both parties without any objection that either party was surprised thereby and not prepared to meet it. By the nature of this evidence it was of necessity developed in showing the facts as they existed which facts were relevant to the issues as made by the pleadings. It is a well recognized rule [fol. 168] in this and other courts that where plaintiff alleges a wrong committed in one manner and the defendant proves that he did not commit the wrong in the manner alleged but did commit that same wrong in a different manner, that the court may award in plaintiff's favor on the basis of the facts as proved. I think the principle involved in that kind of a case is applicable here. It would probably have been better had plaintiff asked leave to amend his complaint to conform to the proof, but as long as the proof was before the court and no one had been deprived of full opportunity to rebut or disprove it I think that question should have been submitted to the jury.

It may well be that plaintiff himself was guilty of contributory negligence in attempting to cross the pit on this board by swinging around the post as he did. Obviously had he stopped to think he would have recognized that to swing around this post was more dangerous than to go around the pit, or to step over or stoop under the chain. But under the Federal Employee's Liability Act contributory negligence is not a defense. If the evidence shows that the defendants' negligence was a contributing proximate cause of the accident that is all that is necessary. In this case, in my opinion, all that was necessary was that a showing be made that the defendants as reasonable persons should have anticipated that plaintiff and the other employees similarly situated would continue to use this board in crossing the pit and that in so doing the place to work was unsafe. This question I think should have been submitted to the jury.

Even if we were to conclude that the placing of this chain around the pit was in itself sufficient notice to plaintiff and the other employees similarly situated that they should not use this board to cross the pit when it was open, I think the [fol. 169] evidence is sufficient from which the jury could reasonably find that such employees had continued to so use this board after the chain was placed around the pit the same as they used it before so as to notify the defendants of such use and that in view of such use this was an unsafe place to work. In my opinion neither the record nor the extracts therefrom quoted in the prevailing opinion can be read without concluding that plaintiff and his witness were positively testifying that after the chain was placed there, plaintiff and his crew and the other employees similarly situated continued to use this board to cross the pit whenever it was convenient for them to do so, as they did prior to the placing of the chains, and that neither of them receded from this positive testimony or testified contrary thereto on cross examination. While plaintiff's witness on cross examination only mentioned the names of two persons and two occasions when he saw such employees crossing the board when the pit was open after the chain was placed around it, this does not mean that those two occasions were the only ones where he saw such employees cross the board after the chain was placed around the pit. It only means that those two occasions were all that readily came to his mind. It might well be that he could have seen such employees cross that board over and over again and still only be able to recall two specific events when that had occurred. If that had become a common occurrence in his days work, it would be natural that he would not retain them so that he could mention each one of such events.

Nor do I agree that the fact that three other employees of the defendants testified that they had not seen plaintiff or any other employee similarly situated cross the board when the pit was open after the chain was placed around it, was very strong evidence that such was not the custom. [fol. 170] It is not shown that had this been the custom that these witnesses would have remembered seeing this happen, these witnesses were not shown to have been there constantly nor was it shown that had they seen such employees so cross the board that they would have remembered it. So their testimony is not necessarily in conflict with the testimony of plaintiff and his witness. But even if it were, in my opinion, it is still a question of fact for the jury

and we cannot determine this fact against the plaintiff as a matter of law.

I therefore am of the opinion that this case should have been submitted to the jury on these issues.

[fol. 171] IN THE SUPREME COURT OF UTAH

JUDGMENT—November 20, 1947

"This cause having been heretofore argued and submitted and the Court being sufficiently advised in the premises, it is now ordered, adjudged and decreed that the judgment of the District Court herein be, and the same is, affirmed, with costs to respondent."

[fol. 172] IN THE SUPREME COURT OF UTAH

GROUNDS RELIED UPON BY APPELLANT IN SUPPORT OF HIS PETITION FOR REHEARING—Filed December 31, 1947

Point I

This Court has by its opinion herein deprived the plaintiff of a jury trial and has decided this case contrary to the opinions in controlling cases decided by the Supreme Court of the United States.

Point II

This Court erred in deciding as a matter of law that the chains and posts around the pit constituted notice to plaintiff and other employees that they should not use the plank to cross the pit when the pit was open and the chains were up, and that therefore the plank from which plaintiff fell was not a place of work for plaintiff.

Point III

This Court erred in deciding as a matter of law that there was insufficient evidence from which a jury could find a custom of trainmen and other yard employees of walking around the chain posts and using the plank as a walkway when cars were over the wheel pit.

Point IV

This Court erred in deciding as a matter of law that the place where plaintiff was injured was not a place of work

and that even assuming it were a place to work, defendant was not negligent in maintaining it in an unsafe condition.

[fol. 173] IN THE SUPREME COURT OF UTAH

ORDER DENYING PETITION FOR REHEARING—Filed February 10, 1948

"Upon consideration of the Petition for Rehearing, heretofore filed herein, and the arguments of counsel thereupon had, it is ordered that a rehearing be, and the same is denied."

[fol. 174] IN THE SUPREME COURT OF UTAH

PRAECIPE FOR RECORD—1948

To the Clerk of the Above Entitled Court:

Clyde Wilkerson, plaintiff and appellant in the above matter, hereby designates and requests you to transcribe and certify the following material portions of the record to be incorporated into the transcript of record to be transmitted to the Supreme Court of the United States to accompany the Petition for a Writ of Certiorari in said cause to be filed in said Court by plaintiff and appellant.

(References to "R" are to the page numbers of the Judgment Roll and Bill of Exceptions, as contained in the Record on Appeal from the Third Judicial District Court to the Supreme Court of the State of Utah, said numbers appearing at the bottom righthand corner of each page.)

1. Complaint, filed May 27, 1946 (R. 1 to 6).
2. Answer, filed June 19, 1946 (R. 9 to 10).
3. Minute Entry, dated October 2, 1946, by J. Allan Crockett, Judge (R. 15).
4. Minute Entry, dated October 3, 1946, J. Allan Crockett, Judge (R. 16).
5. Defendants' Motion for Directed Verdict (R. 17, 18 and 19), filed October 3, 1946.
6. Verdict, dated October 3, 1946 (R. 31-A).
7. Judgment on Verdict, dated October 3, 1946 (R. 32).
8. Notice of Appeal, filed November 18, 1946 (R. 38).

9. Minute Entry, dated November 13, 1946, by J. Allan Crockett, Judge (R. 37).

10. Clerk's Certificate (Clerk of the Third Judicial District in and for Salt Lake County), certifying record on [fol. 175] appeal to the Supreme Court of Utah, dated December 12, 1946 (R. 39).

11. The following portions of the Bill of Exceptions, R. 41 to 176, but omitting:

Lines 1 to 24, R. 41, both numbers inclusive.
Lines 27 and 28, R. 42.
Lines 1 to 2, R. 43, both numbers inclusive.
Lines 10 to 24, R. 50, both numbers inclusive.
Lines 18 to 21, R. 68, both numbers inclusive.
Lines 4 to 11, R. 97, both numbers inclusive.
Lines 20 to 28, R. 101, both numbers inclusive.
Lines 1 to 6, R. 102, both numbers inclusive.
Lines 10 to 13, R. 105, both numbers inclusive.
Lines 18 to 26, R. 109, both numbers inclusive.
Lines 1 to 4, and 10 to 17, R. 115, both numbers in each instance inclusive.
Lines 2 to 5, and 21 to 24, R. 140, both numbers in each instance inclusive.
Lines 1 to 6, R. 141, both numbers inclusive.
Lines 26 to 28, R. 171, both numbers inclusive.
Lines 1 to 9, R. 172, both numbers inclusive.

12. Reporter's Certificate (R. 177).
13. Exhibit 1.
14. Exhibit 2.
15. Exhibit 3.
16. Exhibit 5.
17. Proposal for Settlement of Bill of Exceptions, dated November 7, 1946 (R. 185, 186).
18. Acknowledgment, dated November 13, 1946 (R. 187).
19. Order Settling Bill of Exceptions, dated November 13, 1946 (R. 188, 189).

[fol. 176] 20. Appellant's Statement of Errors Relied Upon for Reversal; Brief of Appellant, Filed February 15, 1947, page 17 of Brief.

21. Opinion of the Supreme Court of Utah, filed November 29, 1947.

22. Judgment of the Supreme Court of Utah, dated November 29, 1947. (Minute entry on Judgment: "This cause having been heretofore argued and submitted and the

Court being sufficiently advised in the premises, it is now ordered, adjudged and decreed that the judgment of the District Court herein be, and the same is, affirmed, with costs to respondent.")

23. Grounds relied upon by Appellant in support of his Petition for Rehearing. (Petition for Rehearing filed December 31, 1947), page 2.

24. Order by the Supreme Court of Utah denying Petition for Rehearing, filed February 10, 1948. ("Upon consideration of the Petition for Rehearing, heretofore filed herein, and the arguments of counsel thereupon had, it is ordered that a rehearing be, and the same is, denied.")

25. This Praecipe.

The portions of the Record designated herein are intended to constitute the record in the Supreme Court of the United States upon Petition for Writ of Certiorari to be filed by the plaintiff and appellant and for review upon said Writ of Certiorari, if granted. Said portions of the record are all of the material portions thereof necessary to a proper presentation and consideration in the Supreme Court of the United States of the questions presented by the Petition for Certiorari.

Said transcript is to be prepared as required by law and the rules of this Court and the rules of the United States [fol. 177] Supreme Court concerning Writs of Certiorari and to be immediately filed in the office of the Clerk of the Supreme Court of the United States in Washington, D. C.

Dated, this 1st day of March, A. D. 1948.

Parnell Black, Calvin W. Rawlings, H. E. Wallace, Wayne L. Black, Attorneys for Plaintiff and Appellant.

Received Copy of the foregoing Praecipe this 1st day of March, A. D. 1948.

W. Q. Van Cott, Grant H. Bagley, Sid N. Cornwall, Dennis McCarthy, Attorneys for Defendants and Respondents.

[fol. 178] Clerk's Certificate to foregoing transcript omitted in printing.

(Here follow 2 Photolithographs, side folios 179-180)

EXHIBIT 1

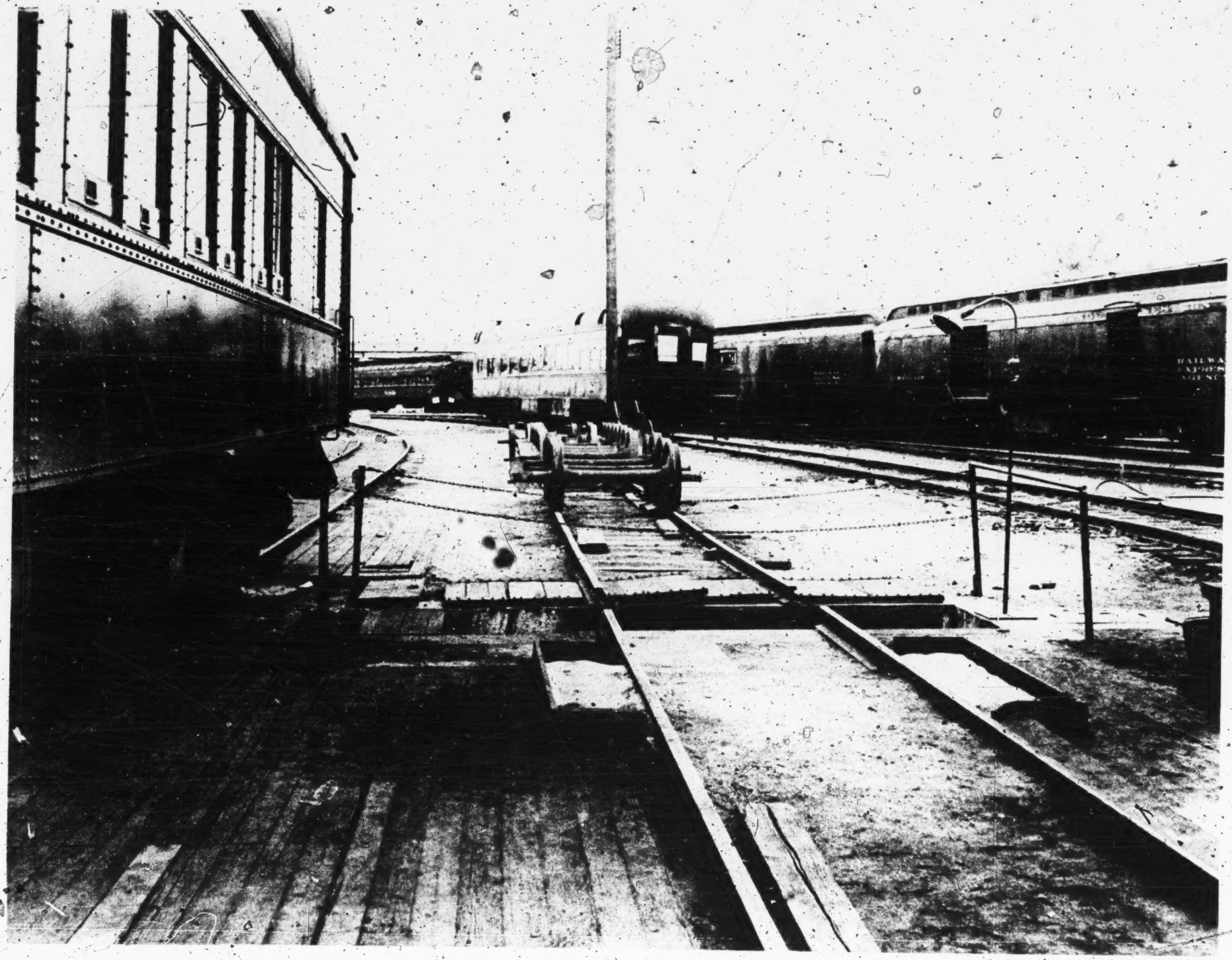
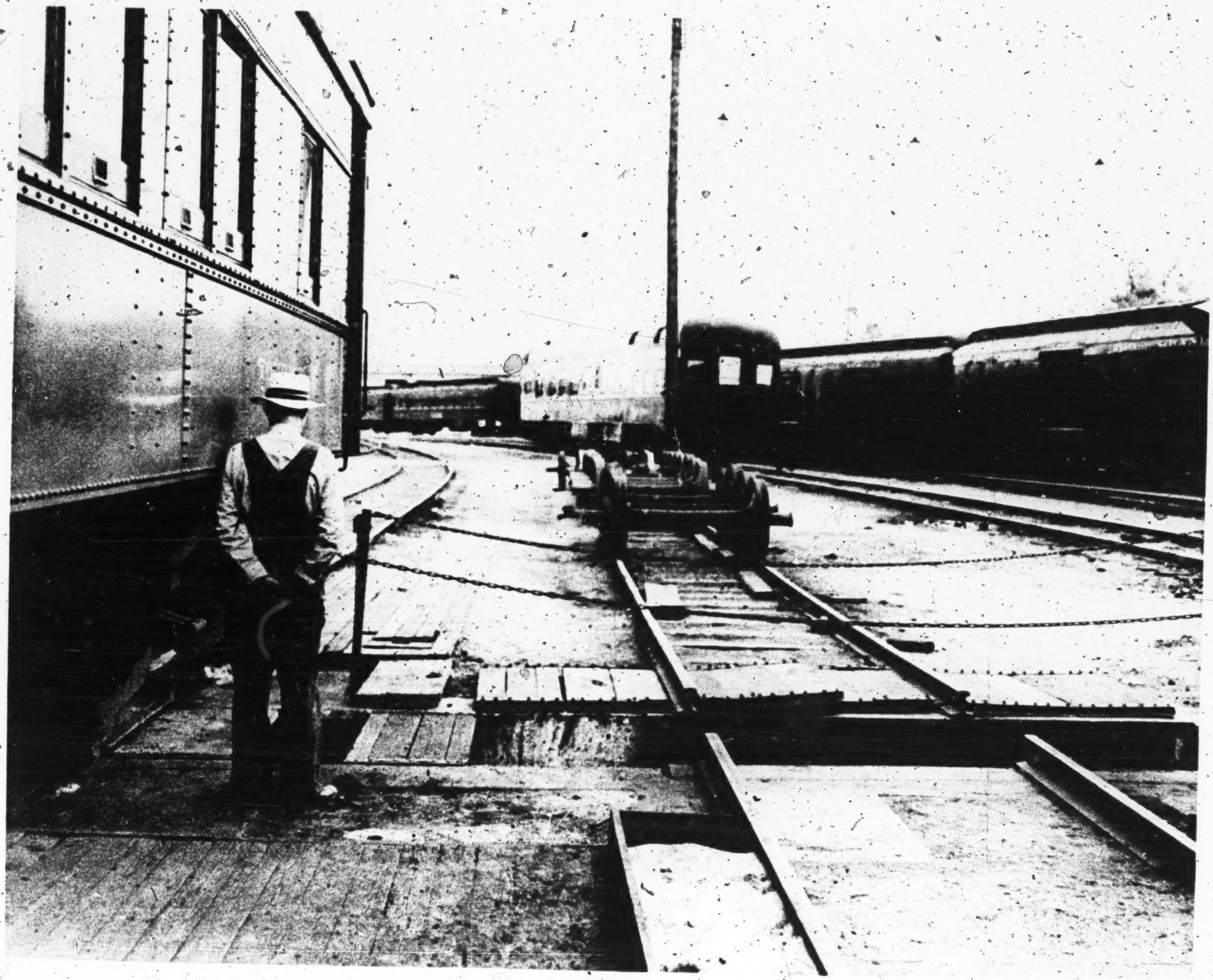


EXHIBIT 5



Petition for Writ of Certiora-ri and Brief in Support There-of

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1947~~ 1948

No. ~~702~~ 53

CLYDE WILKERSON,

Petitioner,

vs.

WILSON McCARTHY AND HENRY SWAN, AS TRUSTEES OF THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, A CORPORATION,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF UTAH AND BRIEF IN SUPPORT THEREOF.

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INDEX

Subject Index

	Page
Petition for writ of certiorari	1
Summary and short statement of matter involved	1
Jurisdictional statement	3
Questions presented	3
Reasons relied on for allowance of writ	4
Prayer for writ	5
Brief in support of petition	6
Opinion of courts below	6
Grounds on which jurisdiction of Supreme Court of United States is invoked	6
Statement of the case	6
Specification of errors	13
Argument	13
I. The Supreme Court of Utah erred in affirming the trial court's ruling granting respondents' motion for a directed verdict and causing judgment to be entered accordingly	13
II. The Supreme Court of Utah erred in holding as matter of law that the place where petitioner was injured while working was not a place to work	15
III. The Supreme Court of Utah erred in holding as matter of law that respondents were not negligent in failing to exercise ordinary care to furnish petitioner a reasonably safe place to work	25
IV. The Supreme Court of Utah usurped the function of the jury in determining proximate cause as matter of law	32
Conclusion	35

Table of Cases Cited

	Page
Anderson v. *Atchison, Topeka and Santa Fe Ry. Co.*, 16 L. W. 4375	2
Atchison T. & S. F. Ry. Co. v. *Ballard*, 108 F. (2d) 768	34
Bailey v. *Central Vermont R. Co.*, 319 U. S. 350, 63 S. Ct. 1062, 87 L. Ed. 1444	2, 14
Ballard v. *Atchison T. & S. F. Ry. Co.*, 100 F. (2d) 162	34
Blair v. *Baltimore & Ohio R. Co.*, 323 U. S. 600, 65 S. Ct. 545, 89 L. Ed. 490	
Boston & Maine R. R. v. *Meech*, 156 F. (2d) 109	30, 31
Cogswell v. *Chicago & Eastern Illinois R. R. Co.*, 328 U. S. 820, 66 S. Ct. 1122, 90 L. Ed. 945	3
Caray v. *Southern Pac. Co.*, 185 P. (2d) 963	5
Ehalt v. *McCarthy*, 104 Utah 110, 138 P. (2d) 639	5
Ellis v. *Union Pacific R. R. Co.*, 329 U. S. 649, 67 S. Ct. 598	19
Gildner v. *Baltimore & O. R. Co.*, 90 F. (2d) 635	34
Grand Trunk Western R. R. Co. v. *Lindsay*, 233 U. S. 42, 34 S. Ct. 581, 58 L. Ed. 838	3, 25, 33
Illinois C. R. Co. v. *Skaggs*, 240 U. S. 66, 36 S. Ct. 249, 60 L. Ed. 528	3, 25, 25, 33
Jamison v. *Encarnacion*, 281 U. S. 635, 50 S. Ct. 440	15
Jesionowsky v. *Boston & Maine R. R.*, 329 U. S. 452, 67 S. Ct. 401	
Lavender v. *Kurn*, 327 U. S. 645, 66 S. Ct. 740, 90 L. Ed. 692	2, 14
McCarthy v. *Pennsylvania R. Co.*, 156 F. (2d) 877	3, 28, 34
Miller v. *Central R. R. Co.*, 58 F. (2d) 635	34
Mumma v. *Reading Co.*, 146 F. (2d) 215	34
Norfolk & Western Ry. Co. v. *Riggs*, 98 F. (2d) 612	34
Pauly v. *McCarthy*, 109 Utah 398, 166 P. (2d) 501	2, 5, 17
Pauly v. *McCarthy*, 329 U. S. 698, 67 S. Ct. 102, 91 L. Ed. 609, 330 U. S. 802, 67 S. Ct. 962, 91 L. Ed. 1261	17
Rocco v. *Lehigh Valley R. R. Co.*, 288 U. S. 275, 53 S. Ct. 343, 77 L. Ed. 743	34

Page

Spokane & Inland Empire R. R. Co. v. *Campbell*, 241 U. S. 497, 36 S. Ct. 683, 60 L. Ed. 1125 3, 22, 32, 33
Tennant v. *Peoria & Pekin Union R. Co.*, 321 U. S. 29, 64 S. Ct. 409, 88 L. Ed. 520 2, 15
Texas and Pacific Ry. Co. v. *Behymer*, 189 U. S. 469, 23 S. Ct. 622 25
Tiller v. *Atlantic Coast Line R. Co.*, 318 U. S. 54, 63 S. Ct. 444, 87 L. Ed. 610, 323 U. S. 574, 65 S. Ct. 421, 89 L. Ed. 465 2, 14, 34
Union Pacific R. Co. v. *Hadley*, 246 U. S. 330, 38 S. Ct. 318, 62 L. Ed. 751 3, 17, 24, 32, 33
Winegar v. *Oregon Short Line R. Co.*, 77 Utah 594, 298 P. 948 21

STATUTES CITED

Judicial Code, section 237 as amended 3
45 U. S. C. A., sections 51-59; 35 Stat. 65, as amended; 36 Stat. 291, and 53 Stat. 1404 3

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 792

CLYDE WILKERSON,

Petitioner,

vs.

WILSON McCARTHY AND HENRY SWAN, AS TRUSTEES OF THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, A CORPORATION,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF UTAH AND BRIEF IN SUPPORT THEREOF.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of Clyde Wilkerson respectfully shows:

Summary and Short Statement of Matter Involved

The Supreme Court of Utah, one Justice dissenting, denied petitioner his right of trial by jury guaranteed by the Constitution in an action arising under the Federal Employers' Liability Act where the evidence clearly demonstrated that respondents failed to furnish petitioner, their employee, a reasonably safe place to work and that such

failure proximately contributed to the cause of his injuries. Contrary to the authorities herein cited the Utah Court held, as a matter of law, that the place where petitioner was injured while working was not a work place and therefore respondents were not liable to him for his injuries, loss and damage.

The trial court granted respondents' motion for a directed verdict and entered a judgment dismissing petitioner's complaint (R. 8-10).

The Supreme Court of Utah, one Judge dissenting, affirmed the judgment of the trial court, the majority being of the opinion that respondents had discharged their duty of exercising ordinary care to provide petitioner a reasonably safe place to work.

Petitioner contends that in reaching this result the Utah Court ruled contrary to the principles of law announced by this Court in *Bailey* v. *Central Vermont R. Co.*, 319 U. S. 350, 63 S. Ct. 1062, 87 L. Ed. 1444; *Ellis* v. *Union Pacific R. R. Co.*, 329 U. S. 649, 67 S. Ct. 598; *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. 54, 63 S. Ct. 444, 87 L. Ed. 610, 143 A. L. R. 967; *Tiller* v. *Atlantic Coast Line R. Co.*, 323 U. S. 574, 65 S. Ct. 421, 89 L. Ed. 465; *Tennant* v. *Peoria & Pekin Union R. Co.*, 321 U. S. 29, 64 S. Ct. 409, 88 L. Ed. 520; *Pauly* v. *McCarthy, et al.*, 329 U. S. 698, 67 S. Ct. 102, 91 L. Ed. 609, 330 U. S. 802, 67 S. Ct. 962, 91 L. Ed. 1261 reversing *Pauly* v. *McCarthy, et al.*, 166 P. (2d) 501; *Blair* v. *Baltimore & Ohio R. Co.*, 323 U. S. 600, 65 S. Ct. 545, 89 L. Ed. 490; *Lavender* v. *Kurn*, 327 U. S. 645, 66 S. Ct. 740, 90 L. Ed. 692; *Jesionowsky* v. *Boston & Maine R. R.*, 329 U. S. 452, 67 S. Ct. 401; *Anderson, Administratrix of the Estate of L. C. Bristow, dec.* v. *The Atchison, Topeka and Santa Fe Ry. Co.* (decided April 26, 1948), not yet officially reported, but published in 16 L. W. 4375, reversing S. Ct. of California, 187 P. (2d) 729; *Boston & Maine R. R.* v. *Meech*, 156 F. (2d) 109, (1 C. C. A. 1946, Cert. Den. Oct. 28,

1946) 329 U. S. 763, 67 S. Ct. 124; *Cogswell* v. *Chicago & Eastern Ill. R. R. Co.*, 328 U. S. 820, 66 S. Ct. 1122, 90 L. Ed. 945 reversing *Cogswell* v. *Chicago & E. I. R. R. Co.*, (C. C. A. 7th), 153 F. (2d) 94.

In cases above cited this Court has held that questions, such as those decided here by the Utah Court, as matters of law, are for the jury, and that the refusal of trial courts to submit such issues constitutes an abdication of the court's sworn duty to guard and protect the right of litigants, suing under the Federal Employers' Liability Act, to jury trial; that to deprive railroad workers of the benefits of this right takes from them a goodly portion of the relief afforded by Congress.

Jurisdictional Statement

(a) Jurisdiction to grant this petition is sustained by Section 237 of the Judicial Code as amended, subparagraph (b), Section 1, Chapter 229, 43 Statutes 937, Title 28, U. S. C. A., Section 344.

(b) The Statutes of the United States applied by the Supreme Court of Utah are 45 U. S. C. A., Sections 51-59; 35 Stat. 65, as amended; 36 Stat. 291, and 53 Stat. 1404.

(c) The judgment of the Supreme Court of Utah was rendered on November 29, 1947. It is set forth at R. 109-129, is not yet reported in the official Utah reports, but appears at 187 P. (2d) 188. The petition for rehearing was denied February 10, 1948 (R. 130). This petition for certiorari was filed May 10, 1948.

Questions Presented

The question presented is whether the Supreme Court of Utah properly applied the United States Statutes commonly called the Federal Employers' Liability Act, or whether the application made by it is inconsistent and in

conflict with controlling decisions of the Supreme Court of the United States. By its decision the Utah Court improperly held as a matter of law, (a) that the place where petitioner was injured while working was not a place of work, and (b) even assuming it to be a place of work, respondents were not negligent in maintaining it in an unsafe condition; (c) that there was insufficient evidence from which a jury could make a finding that switchmen and other yard employees customarily passed around the chain posts and over the plank across the wheel pit when cars were standing on Track 23½; (d) that the chains and posts around the pit, as a matter of law, constituted notice to petitioner and other employees that they should discontinue the practice of crossing over the pit on the plank, and therefore the plank from which petitioner fell was not a work place; (e) that petitioner's conduct was the sole proximate cause of his injuries.

Reasons Relied On for Allowance of Writ

The Supreme Court of Utah has decided a Federal question of substance and importance in a way not in accord with controlling decisions of this Court. It affirmed a judgment of dismissal based on a verdict directed by the trial court in an action brought under the Federal Employers' Liability Act where the evidence was clearly sufficient to supply an evidentiary basis for petitioner's cause. By its decision the Utah Court has usurped the functions of the jury contrary to repeated admonitions of this Court, and has wrongfully deprived petitioner of his right to a jury trial guaranteed by the Constitution.

It is essential that a Writ be granted in order to determine important questions relating to the construction, interpretation and application of the Federal Employers' Liability Act in Utah, and specifically to determine whether the Utah Supreme Court will be permitted to continue to

construe and apply the Federal Employers' Liability Act in a manner contrary to the controlling decisions of this Court and other Federal Courts. See *Ehalt* v. *McCarthy, et al.*, (1943), 104 Utah 110, 138 P. (2d) 639; *Pauly* v. *McCarthy, et al.*, 166 P. (2d) 501, reversed and remanded, 330 U. S. 802, 67 S. Ct. 962, 91 L. Ed. 1261; *Coray* v. *Southern Pac. Co.*, (Oct. 31, 1947), 185 P. (2d) 963, and the decision of the Utah Supreme Court in this cause.

Prayer

WHEREFORE, your petitioner prays that a Writ of Certiorari be issued out of and under the seal of this Court directed to the Supreme Court of the State of Utah commanding said Court to certify and send to this Court a transcript of the record in the case entitled Clyde Wilkerson, Appellant, v. Wilson McCarthy and Henry Swan, as Trustees of The Denver and Rio Grande Western Railroad Company, a corporation, Respondents, No. 7017, including also the proceedings in said Supreme Court to the end that said cause may be reviewed by this Court and the judgment of the Supreme Court of Utah be reversed with instructions to grant petitioner a trial by jury in the Third Judicial District Court of Utah.

CLYDE WILKERSON,
Petitioner,

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinion of Courts Below

The trial court granted respondents' motion for a directed verdict on the 2nd day of October, 1946 (R. 8-10). The Opinion of the Supreme Court of Utah is set forth at R. 109 to R. 129, is not yet reported in the official Utah Reports, but appears at 187 P. (2d) 188.

Grounds on Which Jurisdiction of Supreme Court of the United States Is Invoked

The judgment of the Supreme Court of Utah was rendered on November 20, 1947 (R. 129). Petition for rehearing was denied on February 10, 1948 (R. 130). Petition for Writ of Certiorari was filed on May 10, 1948. The judgment of the Supreme Court of Utah is based upon its application of the United States Statute commonly called the Federal Employers' Liability Act, 45 U. S. C. A., Secs. 51-59; 35 Stat. 65, as amended; 36 Stat. 291, and 53 Stat. 1404. The jurisdiction of the Supreme Court of the United States is invoked under Section 237 of the Judicial Code, as amended by Act of February 13, 1925, c. 229, Sec. 1; 43 Stat. 937; 28 U. S. C. A., Sec. 344, and the Act of February 13, 1925, c. 229, Sec. 8; 43 Stat. 940; 28 U. S. C. A., Sec. 350.

Statement of the Case

Petitioner, an experienced switchman, sixty years of age (R. 31), was injured on the 26th day of July, 1945, as a result of falling into respondents' wheel pit at a point near the west rail of Track 23½ in respondents' coach yards as Denver, Colorado while working as a switchman (R. 34).

Petitioner brought action in the District Court of Salt Lake County, Utah. Following the presentation of evidence, the court granted respondents' motion for a directed verdict (R. 8-10), and judgment was entered against petitioner (R. 10).

Respondents were charged with negligence in failing to exercise ordinary care to provide petitioner a reasonably safe place to work. Petitioner alleged a failure to place a safe or substantial covering over the wheel pit at the point where he and other switchmen customarily crossed over the pit in the usual and ordinary performance of their duties; that the plank across the pit was loose and not firmly set or affixed or attached to the side-walls of the pit, and that due to the insecure installation of the plank, footing was unstable and the plank would and did turn and shift when a man's weight was placed upon it. Petitioner also alleged that respondents caused and permitted grease, oil and other slippery substances to accumulate and remain upon the plank, and that as he stepped upon it while crossing over the pit, due to the grease and oil and the insecure and unstable placement of the plank, he was caused to slip, lose his balance and fall to the bottom of the pit, thus sustaining the injuries complained of (R. 1-5).

When in use the pit was enclosed on three sides, north, south and west, by means of chains fastened to four corner posts (Exs. 1 and 5, R. 132A, 132B, R. 63, 64). Cars, with wheels to be removed for replacement or repair, were placed over the pit on Track 23½ to the east of the chains and posts. Track 23½ extends through a portion of the yards in a northerly and southerly direction. The wheel pit passes under Track 23½ and other switch tracks and extends through a portion of the yards in an easterly and westerly direction. It has cement walls and floor (R. 34, 61).

The following measurements are deemed pertinent in discussing the facts pertaining to petitioner's accident:

1. Width of cover board (on which petitioner slipped)—22 inches.
2. East edge of cover board is west of easternmost chain posts—9½ inches.
3. East chain posts are west of west rail—36 inches.
4. Width of the wheel pit—4 feet, 2½ inches.
5. Depth of the wheel pit—10 feet, 7 inches.
6. From edges of the wheel pit to their closest chain posts—19 inches.
7. From east safety chain posts to west safety chain posts—16 feet, 5½ inches.
8. From northeast safety chain post to southeast safety chain post—7 feet, 6 inches.

(R. 57-59, 61, 62, 64-67.)

At the time of the accident a tourist sleeper car was standing on Track 23½ over the wheel pit (R. 34, 41). The vertical distance between the car body and the rail was 44 inches (R. 65), the height of the rail was 7 inches above the ties (R. 65). The post being 42 inches in height, the distance between the top of the post and the car body was 9 inches vertically, and laterally from the outermost portion of the car body to the post, 7 inches (R. 59, 65, 67). The post leaned slightly to the west (R. 59). There was considerable free space underneath the car body extending down to the roadbed (R. 66, 67). The posts were removable from the metal tubing imbedded in cement into which they were placed when in service and it is a fair inference that there was some play between posts and tubing (R. 64). Two planks were across the wheel pit when petitioner was injured, one immediately to the west of the west rail, a space of approximately 18 inches separated it from the other plank. The easterly edge of the latter plank was 9½ inches west of the post. Petitioner fell from the second plank. This plank was 22 inches in width, 4 feet 2½ inches in

length, constructed of several boards bolted together and weighed approximately 75 pounds (R. 51, 57, 88).

The locus of the accident and all of the physical facts as above set forth are clearly illustrated by the model (Respondents' Exhibit No. 2, and the photographs, Exhibits No. 1 and 5, R. 132A, 132B).

Petitioner was engaged in the performance of his duties as engine foreman at the time of his injury. His shift was from 7:00 a.m. to 7:00 p.m. His crew, in addition to himself, consisted of two switchmen, an engineer and fireman (R. 32). The crew worked under petitioner's direction (R. 32); their work was switching passenger cars in the coach yard and spotting cars to be repaired over the wheel pit or at such other points as designated (R. 32).

On the morning of the accident at about 7:30 or 8:00 o'clock a.m., petitioner received instructions to spot a tourist sleeper on Track 23½ so the car men could change a pair of wheels (R. 34). At that time the safety chains were up (R. 36, 37). The pit was then uncovered with the exception of the plank immediately adjacent to the west rail of the track and the plank from which petitioner later fell (R. 36). Petitioner was on the east side of the car when it was spotted. Immediately thereafter, he crossed the wheel pit by passing over the plank from which he later fell (R. 37). A few minutes prior to the accident petitioner went to the battery house, located to the north of the wheel pit, for a drink of water, he then returned to the pit. He walked along the west side of the tourist sleeper looking for a Mr. Hawkins, the man in charge of the car repairmen working in the pit, "to see if he was through with this particular car so the car could be moved and I could go get another bad order car that I knew they were in a hurry for and spot it for him, so he could get the other car done for our noon—for a two o'clock train, I believe it was wanted for" (R. 42).

As petitioner was crossing over the pit he fell. In describing the occurrence he stated (R. 41):

> "A. • • • I started coming around the chain, put my right hand on the top of the post came around the chain and turned around and started to cross the cover board, putting my right foot on the cover board. As I did so, this board felt to me like there was a little rock or gravel which caused it to tip under the weight of my foot, starting my foot to slide and away I went to the bottom of the pit. • • •" (R. 41).

He fell to the west of the plank but it remained in place (R. 50, 52).

The posts and chains along the wheel pit had been installed in February or March of 1945 (R. 73). The testimony was conclusive that car repairmen, switchmen and trainmen customarily walked over the plank in crossing the pit when the chains were up, as petitioner was doing when injured (R. 17, 18, 22, 37-39, 54).

Arbogast, a switchman of twenty-six years experience, working in the coach yards at the time of trial and who had worked there both before and after the chains and posts were installed, and exceptionally well acquainted with the locus of the accident, testified (R. 17, 18):

> "Q. And what have you noticed with reference to the practice of men passing between the standing cars on 23½ and the posts that hold the safety chains?
>
> "A. Well, they would walk through and get on the board and walk to and from each side, and the men that work on the pit work on that board, and sometimes set on the board next to the—in next to the car there to perform their work, you know, like where they are up under, or working on the car, they use the board over from it to work on" (R. 17).
>
> • • • • • • •
>
> "Q. And what can you say with reference to the—such occurrences, as to how often they happen?

"A. Oh, I would judge that I saw the men pass through there dozens of times. * * * you would see them walking numerous times, number of times, you know" (R. 18).

Mr. Arbogast had held the same job petitioner was holding when injured. He placed cars over the wheel pit and removed them every day in the performance of his duties (R. 18). He testified concerning his own practice (R. 18):

"A. When I have occasion to pass through there, I put my hand on the post, step over on the board, and go around the other post, and that is the way I pass to and from on the pit" (R. 18).

Petitioner testified (R. 38):

"Q. I will ask you to state whether or not you observed any practice with reference to crossing over the pit when men were working on the cars there in the daytime before these chains were installed?

"A. Walked right straight across the board.

"Q. Was there a board usually there to walk over?

"A. Yes, sir.

"Q. *Was there any change in that practice after the chains were installed?*

"A. None, only they had to walk around the chains.

"Q. At any time while you were working in the yards there before you were injured, did you ever receive any instructions from anyone forbidding you to cross over the pit?

"A. No, sir.

"Q. You may state whether or not you observed men cross over the pit as you have indicated here on more than incidental occasions.

"A. Yes, sir.

"Q. *What did you observe with reference to the number of times the occasion when men would cross over the pit?*

"A. *Oh, I couldn't say; I suppose maybe a hundred times; varies, men, both switchmen and car men or*

others working there in the yard necessary, pullman employees and so forth.

"Q. *Crossed over the pit?*

"A. *Yes, sir, it was a common practice for everybody to use that that way*" (R. 38).

There was evidence to support petitioner's contention that the plank tilted and that he slipped on what he believed to be a greasy substance on the plank.

Hawkins testified that there was no practice of cleaning the plank and that it was cleaned only once in a period of two years. He testified that car repairmen working in the wheel pit sometimes got grease on their shoes and that the grease came off onto the plank (R. 89-91). Petitioner had observed grease on the plank earlier that morning (R. 39), and saw grease on the plank when he fell (R. 98).

As illustrating the attitude of the Utah Court in determining the facts and showing the extent to which it went in resolving all issues against petitioner, we quote the following from the opinion (R. 116):

> "* * * The construction of the enclosure was such that with a standard tourist car there was not to exceed seven inches in clearance between the overhang of the car and the guard post. On wider cars, the clearance was less. To an ordinary reasonable person it was obvious that the railroad company had intended to close this pathway to all traffic crossing the pit. There just would not be any sense or logic in forcing plaintiff to go to the extent of literally squeezing himself between the post and car if it were intended to permit his continued use of the crossing." (R. 116)

This statement is not only inaccurate, but is contrary to the evidence. Exhibit No. 1, R. 132A, clearly reveals that no such physical contortions, as described by the court, are necessary in passing around the post. The testimony of petitioner, Arbogast and Hawkins indicate that there is

sufficient space for large men to pass with ease between the post and a car on the track. Hawkins, who weighed 250 pounds, testified that he could pass between the post and a car standing on the track (R. 84, 96, 97). Arbogast, who weighed 176 pounds and was 6 feet 2 inches in height, testified that he could do it with ease (R. 39, 104). Petitioner was much smaller than either of these men and, of course, would have no difficulty in passing between the post and a car on the track (R. 97). This is true because the top of the post is considerably lower than the car body.

Specification of Errors

The Supreme Court of Utah committed prejudicial and reversible error:

1. In affirming the trial court's ruling granting respondents' motion for a directed verdict and causing judgment to be entered accordingly;

2. In holding as matter of law that the place where petitioner was injured while working was not a place to work;

3. In holding as matter of law that respondents were not negligent in failing to exercise ordinary care to furnish petitioner a reasonably safe place to work;

4. In usurping the function of the jury in determining proximate cause as matter of law.

ARGUMENT

Point I

The Supreme Court of Utah erred in affirming the trial court's ruling granting respondents' motion for a directed verdict and causing judgment to be entered accordingly.

There was adequate and sufficient evidence to show that the plank from which petitioner fell and received his injuries was provided by respondents as a walkway for peti-

tioner and other employees in the performance of their duties, and was customarily so used by switchmen and other employees, and that the usage of the plank for that purpose was of such duration and nature as to afford ample notice of the fact to respondents.

There was adequate and sufficient evidence to demonstrate that the plank, as constructed and maintained, constituted a dangerous and unsafe place of work for petitioner and his fellow employees. The trial court, therefore, erred in granting respondents' motion for a directed verdict and the Supreme Court of Utah erred in affirming the trial court's ruling. The ruling of the Supreme Court of Utah is contrary to and in conflict with the controlling decisions of this Court in the cases cited at page 2 of the Petition for Writ of Certiorari.

"Where there is an evidentiary basis to support a verdict the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable." "Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear." *Lavender* v. *Kurn*, 327 U. S. 645, 66 S. Ct. 740, 90 L. Ed. 692.

Questions of negligence under proper charge from the court should be submitted to the jury for their determination, so long as the jury system is the law of the land and the jury is made the tribunal to decide disputed questions of fact. *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. 54, 87 L. Ed. 610, 63 S. Ct. 444.

To deprive railroad workers of the benefits of jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them. *Bailey* v. *Central Vermont R. R. Co.*, 319 U. S. 350, 87 L. Ed. 1444, 63 S. Ct. 1062.

The choice of conflicting versions of the way an accident happened and the inferences to be drawn from uncontroverted as well as controverted facts, are questions for the jury. Once there is a reasonable basis in the record for concluding that there was negligence which caused the injury, it is irrelevenat that fair-minded men might reach a different conclusion. For then it would be an invasion of the jury's function for an appellate court to draw contrary inferences or to conclude that a different conclusion would be more reasonable. *Ellis* v. *Union Pacific R. R. Co.*, 67 S. Ct. 598, 329 U. S. 649.

It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from a jury. The jury is the fact-finding body and the very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. *Tennant* v. *Peoria and Pekin Union R. Co.*, 321 U. S. 29, 64 S. Ct. 409, 88 L. Ed. 520.

The Federal Employers' Liability Act is not to be narrowed by refined reasoning or for the sake of giving "negligence" a technically restricted meaning. It is to be construed liberally to fulfill the purposes for which it was enacted, and to that end the word may be read to include all the meanings given to it by courts, and within the word as ordinarily used. *Jamison et al.* v. *Encarnacion*, 281 U. S. 635, 50 S. Ct. 440 at page 442.

Point II

The Supreme Court of Utah erred in holding as matter of law that the place where petitioner was injured while working was not a place to work.

The first reason advanced by the Supreme Court of Utah for its holding that the place where petitioner was working when injured was not a place of work, was that the posts

and chains constituted adequate and sufficient notice to employees not to cross the wheel pit over the plank. The Court stated (R. 115):

> "• • • However, defendants, nearly three months before the accident, attempted to stop this practice by enclosing the pit. This is not the case in which an employer attempts to stop an unsafe practice by publishing written notice to employees to discontinue. No rules or regulations to prohibit the practice were promulgated. Instead, the defendants adopted a different, and we think a more effective method of notifying employees generally in the yard to stop the practice of crossing the wheel pit. They blocked the path." (R. 115)

And again (R. 117):

> "• • • Accordingly, we hold that the installation of the chain and posts was notice by defendants to all employees generally in the yard that the board was not to be used as a walk-way for crossing the pit." (R. 117)

The holding of the court is based on an inference unwarranted by the evidence. Petitioner testified as to the purpose of the guard chains as follows (R. 101):

> "Q. Mr. Wilkerson, what are these guard chains up here for in your understanding?
> "A. To keep people from walking directly into the open pit.
> "Q. To keep people from falling into the pit?
> "A. Yes, sir." (R. 101)

Respondents have never denied that car men used and maintained the plank over the pit as a walkway. The evidence is without conflict that no signs were posted, no rules or regulations promulgated, no instructions given forbidding the use of the plank by switchmen and other workmen as a walkway.

The Supreme Court of Utah has refused to abdicate the position taken by it in *Pauly* v. *McCarthy, et al.*, 109 Utah 398, 166 P. (2d) 501. This Court granted certiorari in that case, 329 U. S. 698, 67 S. Ct. 102, 91 L. Ed. 609, and reversed without opinion, 330 U. S. 802, 67 S. Ct. 962, 91 L. Ed. 1261.

Here again the Utah Court repeats the reversible error made in the *Pauly* case by holding that the place where respondents' employees worked was not a place to work and hence there was no duty to maintain it in a reasonably safe condition for its foreseeable use (R. 123).

The Utah Court reaffirmed the erroneous holding made by it in the *Pauly* case by holding that the place where petitioner was working when injured was not a place to work because respondents, as matter of law, could not be required to anticipate that their employees would work where they worked (R. 115, 123).

The above court-made finding of absolute non-existence of duty to foresee or anticipate the use of the plank as a walkway was based upon a supposedly implied notice to discontinue such usage. The implied notice was clearly ineffective inasmuch as the employees completely disregarded it as such and continued to use the place as a place of work as they always had done before. The Utah Court concedes that there was testimony to this effect (R. 112):

> "Plaintiff testified that prior to installation of the safety chains it was the practice of the men working generally in the yard to cross the wheel pit by means of the permanent board, and that there was no change in this practice after the chains were put up, other than that the men had to go around the post and between it and the side of the car standing on the track." (R. 112)

See also testimony quoted by the Utah Court at R. 118. Petitioner was corroborated in this by the testimony of Arbogast (R. 17, 18, 22).

The evidence clearly demonstrated that this so-called implied notice to refrain from using the permanent plank as a walkway was completely ineffective and that the placing of the posts and chains was never regarded by switchmen as notice to discontinue the practice of crossing over the pit on the plank. The Utah Court conceded that the installation of the posts and chains was not notice to respondents' employees working in the pit.

Just why the pit men "had" to use the plank and the petitioner "had" to go around the pit or stay away from it is not readily perceptible. The pit men undoubtedly could have gone around the pit also.

How were petitioner and other employees to know that the installation of the posts and chains was special notice to them to discontinue the practice of crossing over the pit on the plank? Looking at this situation from a practical standpoint one can understand why this so-called implied notice was ineffective. The plank had been used as a means of crossing over the pit ever since the pit was constructed. After the chains were installed the men working in the pit continued to use the plank as a walkway. Other employees in the yard likewise used it. It is fair to assume that all employees having duties to perform in the vicinity of the wheel pit continued to use the plank as a passageway after the posts and chains were installed. Is it reasonable to infer that a switchman observing the chains would conclude "I am not employed as a car man, hence I am not to use the plank as car men use it"?

If the installation of the posts and chains was an implied warning or notice of anything, it was nothing more than a warning or notice that when the chains were up the pit was uncovered and persons working around or near it should take heed of that fact.

The Supreme Court of Utah not only held that the posts and chains constituted adequate notice that the plank should

not be used as a walkway, but that such notice constituted a sufficient and adequate performance of respondents' duty to exercise ordinary care to furnish switchmen a reasonably safe place to work.

Withdrawn from jury consideration were all questions as to whether the duty to exercise ordinary care required that proper signs be posted or a rule or order forbidding use of the plank as a walkway be published, and this, in spite of the undisputed evidence that both before and after installation of the chains and posts, the plank was used as a walkway by car men, switchmen and other railroad employees engaged in the performance of their duties.

This Court stated in *Ellis* v. *Union Pacific R. R. Co.*, 67 S. Ct. 598, that:

> "• • • the inferences to be drawn from uncontroverted as well as controverted facts, are questions for the jury."

The Utah Court has defeated petitioner here by drawing unfavorable inferences against him and disregarding those favorable to him. The court well might have inferred that the posts and chains constituted warning to strangers only, or that the posts and chains constituted warning to strangers and employees whose business did not require their presence near or about the pit, or that the chains were placed in position as protective devices to save persons from falling into the pit when open (petitioner's view as to the purpose of the chains and posts), but the court, contrary to unquestioned law, selected the inference most *unfavorable* to petitioner's cause and based its decision thereon.

The second reason advanced by the Supreme Court of Utah for its holding that the place where petitioner was working when injured was not a place of work was that the evidence was inadequate and insufficient to support a finding that switchmen and other yard employees customarily

passed around the chain posts and crossed over the plank when cars were at the wheel pit. The majority opinion stated (R. 122):

> "* * * It must be conceded that if defendants knew or were charged with knowledge that switchmen and other workmen generally in the yard were habitually using the plank as a walkway in the manner claimed by plaintiff, then the safety enclosure might be entirely inadequate, and a jury question would have been presented on the condition of the board and the adequacy of the enclosure."

It is apparently conceded by the court that if there had been an evidentiary basis for a finding that the custom and practice of switchmen using the plank as a walkway existed, then the adequacy of the enclosure, and the condition of the plank itself would become questions for the jury. Such an evidentiary basis was adequately supplied by the testimony.

For years previous to the installation of the posts and chains, car men, switchmen, trainmen and other of respondents' employees had habitually and customarily used the plank across the pit as a walkway (R. 22, 38). The chains and posts had been up about three months prior to the accident and petitioner testified that there was no change in practice after the chains were installed (R. 38). Petitioner had seen switchmen, car men and pullman employees use the plank in the same manner as he was using it when injured "maybe a hundred times." (R. 38). "It was a common practice for everybody to use that that way" (R. 38).

If the Utah Supreme Court's finding is based on the fact that an insufficient period of time had elapsed since the chains and posts were installed for the establishment of a custom, then what amount of time is required for a custom and practice to become fixed so as to charge respondents with notice of its existence? Is this not a matter upon

which reasonable minds might differ? The custom of using the plank as a walkway was of long duration, it continued without interruption after the chains and posts were placed in position. How many times must switchmen walk across a plank before a custom and practice comes into existence? A hundred times? A thousand times? Ten thousand times? This would seem to be a proper question for the jury. If petitioner saw switchmen, car men and pullman employees use the plank as a walkway a hundred times it could be fairly inferred that such employees so used it a great many times when petitioner was not present, yet the holding of the Utah Supreme Court was based on the court-made finding that there was no evidentiary basis for petitioner's contention that switchmen customarily used the plank as a walkway when the posts and chains were up. Certainly a jury could well find that respondents' so-called implied notice was entirely inadequate to change the existing custom of crossing the pit by walking over the plank.

In the case of *Winegar* v. *Oregon Short Line R. Co.*, 77 Utah 594, 601, 298 P. 948, plaintiff brought action under the Federal Employers' Liability Act to recover damages for personal injuries sustained in the course of his employment, and alleged that it was the "custom, practice and usage in the switch yard of the defendant that, whenever a crew of men were engaged in inspecting, checking, and repairing a string of cars on one of the switch tracks, no car or cars would be run in on an adjoining track without notice or warning thereof to the employees so engaged." Defendant denied the existence of the alleged custom and practice, and the existence of such custom or practice became the controlling question of fact at the trial and on appeal, the sole question being whether the evidence in respect to custom and practice was sufficient to sustain the verdict. Plaintiff and one other witness testified as to the existence of such custom and practice and defendant introduced fifteen wit-

nesses who testified that no such custom or practice existed or prevailed in defendant's yards. The court, however, sustained the verdict for plaintiff.[1]

We believe that the Supreme Court of Utah's decision in this case if followed would place upon a party endeavoring to prove the existence of a custom and usage the burden of establishing such custom and usage as had "obtained the force of law."

Respondents successfully urged the trial court and the Supreme Court of Utah to accept the proposition that the plank was a walkway for car men but not for switchmen. There is no evidence of a rule to that effect. There is no evidence from which such a rule can be inferred.

A third reason advanced by the Supreme Court of Utah for its holding that the place where petitioner was working when injured was not, as to him, a place of work, was that there were other safer ways that he could have adopted in crossing the pit. Whether or not petitioner could have performed his duties by adopting other and safer methods could be considered only in connection with the question of

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[1] "Counsel for the defendant by the authorities cited in that connection, insist that it was incumbent on the plaintiff to show such a custom or usage which has obtained the force of law. With this view we do not concur. * * *"

* * * * * * *

"Counsel for defendant, referring to the number of witnesses called in defendant's behalf, argues: 'There could of necessity be no custom here in the matter of switching cars unless such custom was known by the switchmen and acted upon by them. A custom could not be made or established by one or two employees when all the other employees knew nothing about it.'

"We see no objection to this as a statement of substantive law, but it certainly cannot be seriously urged that the testimony of the switchmen and engine foremen must be taken as conclusive as to the fact of whether they did or did not know of such a practice, or whether they had or had not given such notice or warning. The jury was not obligated to believe the witnesses for the defendant as against substantial evidence in behalf of the plaintiff of the existence of the alleged practice. It is

his own negligence. A very recent and enlightening opinion on this point is *Ellis* v. *Union Pacific Railroad Company, supra.* This Court granted certiorari in that case because of an apparent conflict between the decision of the Nebraska Supreme Court and the opinion of the United States Supreme Court in *Lavender* v. *Kurn, supra.* Ellis based his action upon an alleged failure of the defendant to furnish him a safe place to work. The evidence was conflicting, but this Court determined that evidence and favorable inferences were sufficient to furnish an evidentiary basis for the verdict, and the judgment of the Supreme Court of Nebraska was therefore reversed.[2]

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obvious that the jury believed the testimony of the plaintiff and his witnesses in respect to such custom and practice, as it was within its power to do.

"A very similar situation, and one involving the identical question on principal, was before the Circuit Court of Appeals, Eighth Circuit, in the case of St. Louis & S. F. Ry. Co. *v.* Jeffries, 276 F. 73. Two or three witnesses for the plaintiff testified that there was such a custom, while six or seven witnesses for the defendant testified that there was not. It was urged by defendant, that there was absolutely no evidence to disprove the positive testimony of some of the defendant's witnesses who stated they had not observed any such custom; therefore it was further urged there was uncontradicted evidence that the custom of which plaintiff's witnesses testified was not uniform, and hence not binding, thereby making the existence of the custom a question of law.

"The court held that such a position would render it impossible to ever establish a custom of some witness whose orthodoxy in telling the truth would permit him to deny that there was such a custom as claimed, for, if the proposition is sound, it must be just as sound with one witness as seven. Because certain witnesses testified they had not observed any custom, it cannot be maintained that there is uncontradicted evidence that the custom was not uniform, in view of the testimony of the plaintiff and his witnesses in that respect. We think this case is controlling on the question before us." *Winegar* v. *Oregon Short Line R. Co.*, 77 Utah 594, 298 P. 948.

[2] "From this evidence the jury might have concluded that petitioner had a safe place to work but elected to choose a dangerous one, that any duty of warning was fully discharged by the presence of the sign, and that the engineer had not been negligent in any way. In that view of the case the accident would be an unforeseeable, freak event or one caused solely by petitioner's own negligence. On the other hand, it would not have been unreasonable for the triers of fact to have inferred that it was

In this case petitioner was no sight-seer. He was engaged in the actual performance of his duties under his employment when injured. He approached the pit in search of the car foreman for the purpose of ascertaining when the car could be moved. It is true that he could have watched and waited until the blue flag was removed, or he could have approached the pit from another direction, but in conformity to custom and usage he chose to cross the plank *provided as a walkway.*

Surely a jury could have properly found and inferred from the evidence that petitioner was acting according to well-established custom and practice in using the plank as a walkway over the pit.

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proper and usual procedure to work on the right side of the engine, that the hazard was not readily apparent and was almost in the nature of a trap, that while the sign was placed so as to be readily visible from a train, it was insufficient warning to a man on the ground, and that consequently petitioner was not furnished a safe place to work. And the jury might have thought that the engineer was negligent in failing to perceive the peril in time to avert the accident by a warning or by stopping the engine. Again, both parties might have been found negligent, in which event it would have been the duty of the jury, as the trial judge charged, to render a verdict based upon the damages caused by respondent's negligence diminished by the proportion of negligence attributable to petitioner. 45 U.S.C. Sec. 53, 45 U.S.C.A. Sec. 53.

"The act does not make the employer the insurer of the safety of his employees while they are on duty. The basis of his liability is his negligence, not the fact that injuries occur. And that negligence must be 'in whole or in part' the cause of the injury. 45 U.S.C., Sec. 51, 45 U.S.C.A. Sec. 51. Brady *v.* Southern Ry. Co., 320 U. S. 476, 484, 64 S. Ct. 232, 236, 88 L. Ed. 239 Whether those standards are satisfied is a federal question, the rights created being federal rights. Brady *v.* Southern Ry. Co., supra; Bailey *v.* Central Vermont Ry. Co., 319 U. S. 350, 63 S. Ct. 1062, 87 L. Ed. 1444.

"The choice of conflicting versions of the way the accident happened, the decision as to which witness was telling the truth, the inferences to be drawn from uncontroverted as well as controverted facts, are questions for the jury. Tennant *v.* Peoria & P. U. R. Co., 321 U. S. 29, 64 S. Ct. 409, 88 L. Ed. 520; Lavender v. Kurn, supra. Once there is a reasonable basis in the record for concluding that there was negligence which caused the injury, it is irrelevant that fair-minded men might reach a different conclusion. For then it would be an invasion of the jury's function for an appellate court to draw contrary inferences or to conclude that a differ-

Point III

The Supreme Court of Utah erred in holding as matter of law that respondents were not negligent in failing to exercise ordinary care to furnish petitioner a reasonably safe place to work.

In determining whether the place where petitioner was injured was safe, all safety precautions, if any, taken by the respondents and all precautions which might have been taken by them must be considered and "We must assume the most favorable statement of plaintiff's case to be true. • • •" Mr. Justice Holmes in *Texas and Pacific Ry. Co.* v. *Behymer*, 189 U. S. 469, 23 S. Ct. 622.

In *Bailey* v. *Central Vermont Ry. Inc., supra*, the Court said:

> "The nature of the task which Bailey undertook, the hazards which it entailed, the effort which it required, the kind of footing he had, the space in which he could stand, the absence of a guard rail, the height of the bridge above the ground, the fact that the car could have been opened or unloaded near the bridge on level ground—all these were facts and circumstances for the jury to weigh and appraise in determining whether respondent in furnishing Bailey with that particular place in which to perform the task was negligent."

So too, in the case at bar, the manner in which the chain posts were erected, the clearance between the posts and the side of the car on Track 23½, the efforts required of peti-

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ent conclusion would be more reasonable. Lavender v. Kurn, supra, 327 U. S. at page 652, 66 S. Ct. at page 743. And where, as here, the case turns on controverted facts and the credibility of witnesses, the case is peculiarly one for the jury. Washington & Georgetown R. Co. v. McDade, 135 U. S. 554, 572, 10 S. Ct. 1044, 1049, 34 L. Ed. 235; Tiller v. Atlantic Coast Line R. Co., 318 U. S. 54, 68, 63 S. Ct. 444, 451, 87 L. Ed. 610, 143 A.L.R. 967.

"We think the evidence raised substantial questions for the jury to determine and that there was a reasonable basis for the verdict which it returned." *Ellis* v. *Union Pac. Co.*, 329 U. S. 649, 67 S. Ct. 598, 600.

tioner in passing around the post in order to reach the foot-walk, the width of the foot-walk, the presence or absence of grease on the walk or of a pebble under it, were all factual questions to be considered by the jury in determining whether or not the place where petitioner was working when injured was reasonably safe.

The Supreme Court of Utah realized that the plank, as a walkway, was unsafe, dangerous and inadequate. The majority state (R. 116):

> "• • • Chains running parallel with the plank might have been helpful, but chains running at right angles to the plank could be of no assistance, rather they would be an extra hazard." (R. 116)

• • • • • • •

And at R. 117:

> "• • • In this particular case, the board appears adequate for the use of the pit crewmen, but entirely inadequate if intended to be a cross-walk for other employees. Employees climbing in and out of the pit approach more deliberately, use other and different hand holds, and are more careful of their footing, while employees swinging on to the plank in a hurry are apt to forget about the slippery condition of an oily board and forget about the dangers incident to crossing, as did the plaintiff, who swung himself around the chain post and onto the plank." (R. 117)

The complete disregard of the rule giving petitioner the advantage of the most favorable statement of the case possible under the evidence is clearly revealed in the court's discussion of the evidence with respect to the customary usage of the plank as a walkway. After setting forth petitioner's testimony, the Court states (R. 118, 119):

> "It will be noted from this testimony that it is in no way limited as to dates or employees. The witness

could have been talking about the time before the chains were installed, the time after the chains were installed, or both. If we assume the most favorable version to the plaintiff, this would establish the time as after the chains were installed, but there is no way of telling how much of the use must be credited to the car or pit men, who were constantly using the board in connection with their duties, and how much of the use was chargeable to the switchmen." (R. 118)

And after stating a portion of the testimony of petitioner's witness Arbogast, the Court states (R. 119):

"An examination of this evidence shows the witness could identify two switchmen who crossed the plank during the three months period, but it is entirely lacking in those elements necessary to show acceptance of a custom or practice by acquiescence. The use by employees other than the two is confused between the times before and the times after the installation of the safety chains." (R. 119)

The Court entirely disregarded and overlooked the following testimony of Arbogast on this question (R. 18):

"Q. And what can you say with reference to the—such occurrences, as to how often they happen?

"A. Oh, I would judge that I saw the men pass through there dozens of times. I worked there and I go to work at three o'clock, and the men doesn't quit until four, and the pullman company, they have their work done on that pit, the Rio Grande Company does their work there nearly all the time. All through the war, they were fixing cars and I go to work and I am the only engine—that is my regular work, the coach yard engine, and I would always do that particular work. You know, what was to do after three o'clock, and it would—you know men work with you, you would see them walking numerous times, numbers of times, you know." (R. 18)

It is respectfully submitted that the Supreme Court of Utah has judicially usurped the powers and functions of the jury in drawing the unfavorable inferences of fact above set forth and that in so doing the court has deprived petitioner not only of his right to favorable inferences, but of his right of trial by jury as well. The majority declare (R. 120):

> "* * * The evidence of plaintiff, at the most, established a questionable, sporadic and occasional use of the board in the manner contended for by him, and for a short period of time. This is not sufficient to charge the appellants with notice of the unsafe practice. The evidence falls short of that required to establish a presumption that the defendants had consented to or acquiesced in the improper use of the board as a pathway." (R. 120)

It is submitted that this holding indicates and illustrates a determination on the part of the court to draw from conflicting evidence all inferences necessary for the support of its opinion. The testimony clearly indicated that this plank had been used as a pathway over the wheel pit ever since the pit was constructed; that its use as such was in no way interrupted by the installation of the posts and chains. Petitioner and his crew continued to use it without interruption, as did Arbogast and his crew. How then can the court in justice and fairness to petitioner and in justice and fairness to its oath to guard and protect litigants in the enjoyment of their right of trial by jury in actions brought under the Federal Employers' Liability Act, declare that at most petitioner's evidence established a questionable, sporadic and occasional use of the board in the manner contended by him. This holding alone should require reversal. Again the Court states (R. 123):

> "* * * In this case the defendants had no knowledge, actual or constructive, that switchmen were using the

plank to carry out their tasks, and therefore, they were only required to keep the board safe for the purposes of the pit crewmen." (R. 123)

Where the court finds support for this statement, we do not know. Two of respondents' engine foremen testified to the contrary, petitioner and Arbogast. They testified positively that they themselves continued to use this plank as a walkway after the posts and chains were installed, and that they had seen it so used by their crews and other switchmen and other employees of the respondents. Is it necessary for petitioner to put in the record the affirmative testimony of all the company officials before he is permitted to claim that knowledge of usage has been brought home to the company? It would seem that the evidence of knowledge of usage on the part of the company was conclusive. Certainly an assertion by petitioner that a jury question was presented on this issue is less than he might well claim in view of the evidence.

The dissenting opinion clearly reveals many of the fallacies of reasoning and inference found in the majority opinion. At R. 126, 127 appears the following pertinent statement:

> "* * * Under these circumstances, since the danger in doing so without stopping to consider the possibilities is not apparent, and since human experience teaches that busy men do often take such chances, in my opinion the defendants had they acted as ordinary, prudent men, would have anticipated that the plaintiff and the other employees who were similarly situated would continue to use this board to cross the pit just as they had used it before the chain was placed there. To me it seems that this is the thing that you would naturally expect them to do." (R. 126, 127)

Also at R. 128:

> "* * * I think the evidence is sufficient from which the jury could reasonably find that such employees

had continued to so use this board after the chain was placed around the pit the same as they used it before so as to notify the defendants of such use and that in view of such use this was an unsafe place to work. In my opinion neither the record nor the extracts therefrom quoted in the prevailing opinion can be read without concluding that plaintiff and his witness were positively testifying that after the chain was placed there, plaintiff and his crew and the other employees similarly situated continued to use this board to cross the pit whenever it was convenient for them to do so, as they did prior to the placing of the chains, and that neither of them receded from this positive testimony or testified contrary thereto on cross-examination." (R. 128)

In the case of *Boston & M. R. R.* v. *Meech*, 156 F. (2d) 109 Cert. Den. Oct. 28, 1946), 329 U. S. 763, 67 S. Ct. 124, the eceased was performing the job of stripping engines. He as working on a structure just outside the engine house nown as the washstand, which consisted of two parallel ooden platforms. At the time of his death he was standng near the northerly edge of the southerly platform in the ath of, but oblivious to the approach of the locomotive hich killed him. The case was tried on two counts, the rst being negligent operation of the locomotive, and the econd, which interests us here, being failure to provide a easonably safe work place. The Court said:

"The sufficiency of the evidence to support the verdict on the second count is at least equally clear. The defendant might have painted lines on the platforms of its washstand to indicate the extent to which locomotives overhang them, and thus to warn persons on the platforms of the danger incident to standing near their inner borders, or it might even have set the platforms of its washstand back from the tracks far enough to prevent locomotives from overhanging them at all.

"From the foregoing, it is clear that although some precautions were taken for the decedent's safety,

> further precautions were possible, and from this it follows, as we read the decisions cited above, that there was an 'evidentiary basis' for submitting the issue of the defendant's causal negligence to the jury, and hence that our 'function is exhausted,' Lavender *v.* Kurn, et al., *supra*, (66 S. Ct. 744). Also we think it evident from what we have said that although the decedent could readily have taken more care than he did for his own safety either by standing back from the edge of the platform, or by watching more closely for locomotives coming in from the yard, or by standing on the northerly platform upon which his presence would normally be anticipated and where he would be in the hostler's range of vision from the engineer's seat, still we cannot say that as a matter of law his carelessness was the sole proximate cause of the accident."

Petitioner being entitled to the benefit of all favorable inferences reasonably deducible from the evidence, it may not be amiss to consider what could have been done by the respondents to make the wheel pit and the cross-walk safer for foreseeable use. *Boston & M. R. R.* v. *Meech*, 156 F. (2d) 109 (1 C. C. A. 1946, Cert. Den. Oct. 28, 1946), 329 U. S. 763, 67 S. Ct. 124.

(1) The eastern chain posts could have been placed two or three feet to the west so as to alleviate the necessity of swinging around the posts in order to reach the plank.

(2) The space betwen the plank next to the west rail of Track 23½ and the plank on which the petitioner slipped, could have been covered, giving a wider and better footing.

(3) The plank on which petitioner slipped and fell could have been placed against the plank next to the west rail of Track 23½, giving a wider and better footing.

(4) A wider plank could have been placed across the pit.

(5) Signs prohibiting crossing could have been placed near the pit.

(6) Respondents could have adopted the practice of leaving the posts and chains down during daylight hours when danger of falling into the pit was nil.

(7) Respondents could have adopted the practice of removing the plank on which petitioner slipped when the other planks were removed from over the pit while car men were working therein, thus completely eliminating the unsafe passageway.

Point IV

The Supreme Court of Utah usurped the function of the jury in determining proximate cause as matter of law.

Respondents urged at the trial and on appeal to the Utah Supreme Court that the petitioner's own negligence was the sole proximate cause of his injuries, entirely overlooking abundant evidence that by custom and usage the plank had became a walkway over the pit for switchmen and other employees.

The holding on the question of proximate cause is in conflict with *Tennant* v. *Peoria & Pekin Union R. Co., supra.* There the question was whether the failure to give warning of the intended movement of a train could be found by the jury to be a proximate cause of Tennant's death. The Court, at page 34 of 321 U. S. and page 524 of 88 L. Ed., and page 412 of 64 S. Ct. said:

> "* * * The ultimate inference that Tennant would not have been killed but for the failure to warn him is therefore supportable. The ringing of the bell might well have saved his life. The jury could thus find that respondent was liable 'for * * * death resulting in whole or in part from the negligence of any of the * * * employees.'"

A jury could reasonably find that the location and condition of the plank as a walkway contributed to the cause of

petitioner's injuries. If the walkway had been properly installed and maintained, petitioner, in all probability, would not have fallen therefrom. The ultimate inference that petitioner would not have been injured but for the failure to properly install, equip and maintain the walkway is therefore supportable. Proximate cause is ordinarily a question for the jury. *Lavender* v. *Kurn, supra; Bailey* v. *Central Vermont R. R. Co., supra; Tennant* v. *Peoria & Pekin Union R. Co., supra; Illinois C. R. Co.* v. *Skaggs*, 240 U. S. 66, 36 S. Ct. 249, 60 L. Ed. 528; *Union Pacific R. Co.* v. *Hadley*, 246 U. S. 330, 38 S. Ct. 318, 62 L. Ed. 751; *Spokane & Inland Empire R. R. Co.* v. *Campbell*, 241 U. S. 497, 36 S. Ct. 683, 60 L. Ed. 1125.

This Court in the case of *Pauly* v. *McCarthy, et al., supra*, reversed a holding of the Utah Supreme Court that a railroad's failure to make a bridge within the limits of a passing track safe for its foreseeable use as a work place, was not a proximate cause of injuries sustained by a conductor who stepped off a caboose standing over the bridge in the nighttime.

In this case, as in the *Pauly* case, the Utah Supreme Court has held that petitioner's conduct was the sole proximate cause of his injuries. It is respectfully submitted that petitioner's negligence, if any, was for the jury, and then only in connection with the assessment of damages. The evidence demonstrated that petitioner acted in accordance with the practice and custom being followed in the coach yards at Denver. This finding of negligence on the part of petitioner was employed by the Utah Supreme Court to support its major finding of absence of duty on the part of respondents and thus to become a complete defense to petitioner's action. Contributory negligence has been eliminated as a defense by the express terms of the Federal Employers' Liability Act, U. S. C. A., Title 45, Sec. 53. The holding of the Utah Supreme Court is contrary to the holding of this Court in the following cases: *Grand Trunk West-*

ern R. R. Co. v. *Lindsay*, 233 U. S. 42, 47, 34 S. Ct. 581, 58 L. Ed. 838, 842; *Tiller* v. *Atlantic Coast Line R. Co., supra; Illinois C. R. Co.* v. *Skaggs*, 240 U. S. 66, 36 S. Ct. 249, 60 L. Ed. 528; *Union Pacific R. Co.* v. *Hadley*, 246 U. S. 330, 38 S. Ct. 318, 62 L. Ed. 751.

The condition of the work place having contributed to the cause of the injury, the questions of respondents' negligence in failing to exercise ordinary care to provide their employees a reasonably safe place to work and proximate cause, should have been submitted to the jury, and the Utah Court erred in denying petitioner the right to have the jury pass on these questions. *Rocco* v. *Lehigh Valley R. R. Co.*, 288 U. S. 275, 53 S. Ct. 343, 77 L. Ed. 743; *Miller* v. *Central R. Co.*, 58 F. (2d) 635 (C. C. A. 3rd, 1932); *Gildner* v. *Baltimore & O. R. Co.*, 90 F. (2d) 635 (C. C. A. 2nd, 1937); *Mumma* v. *Reading Co.*, 146 F. (2d) 215 (C. C. A. 3rd, 1944); *Norfolk & W. Ry. Co.* v. *Riggs*, 98 F. (2d) 612 (C. C. A. 6th, 1938); *Ballard* v. *Atchison T. & S. F. Ry. Co.*, 100 F. (2d) 162 (C. C. A. 5th, 1938); *Atchison T. & S. F. Ry. Co.* v. *Ballard*, 108 F. (2d) 768 (C. C. A. 5th, 1940); *McCarthy* v. *Pennsylvania R. Co.*, 156 F. (2d) 877 (7th C. C. A. 1946); *Ellis* v. *Union Pacific, supra.*

In the most recent decision from this Court, *Doris Anderson, Administratrix of the Estate of L. C. Bristow, deceased,* v. *The Atchison, Topeka and Santa Fe Railway Company, a corporation*, not yet officially reported, but published in 16 L. W. Commencing at page 4375, this Court construed and applied, with liberality, that portion of the Federal Employers' Liability Act which provides a remedy in every situation where the negligence of the carrier contributes "in whole or in part" to the cause of the injury. The Court declared:

> "• • • We are unable to agree that had petitioner been permitted to introduce all evidence rele-

vant under her allegations, the fact would have revealed a situation as to which a jury under appropriate instructions could not have found that decedent's exposure and consequent death were due 'in whole or in part' to failure of respondent's agents to do what 'a reasonable and prudent man would ordinarily have done under the circumstances of the situation.' "

Conclusion

It is respectfully submitted that the opinion of the majority of the Supreme Court of Utah in this case is in conflict with express provisions of the Federal Employers' Liability Act and controlling decisions of this Court construing that Act; that a Writ of Certiorari should be granted in order for this Court to review the record and the opinion of the Utah Court and finally reverse the same and remand the cause to the state courts for jury trial in accordance with the law.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 792

CLYDE WILKERSON,

Petitioner,

vs.

WILSON McCARTHY and HENRY SWAN, as Trustees of The Denver and Rio Grande Western Railroad Company, a corporation,

Respondents.

RESPONDENTS' BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI

WALDEMAR Q. VAN COTT,
DENNIS McCARTHY,
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INDEX

SUBJECT INDEX

	Page
STATEMENT OF THE CASE	1
ARGUMENT	7
I. The Federal Employers' Liability Act Does Not Make the Employer the Insurer of the Safety of His Employees	7
II. The Physical Facts and Undisputed Evidence Establish No Duty on the Part of Respondents to Anticipate or Foresee that the Petitioner Would Cross the Wheel Pit Within the Area Enclosed by the Safety Chains	10
The physical facts and evidence	11
No allegations or sufficient evidence to impose notice on respondents with respect to any misuse of the cover board	14
Petitioner seeks to impose a duty on respondents impossible of fulfillment	18
III. There is No Evidence that Petitioner Fell from the Cover Board Because of any Negligence on the Part of Respondents	24
CONCLUSION	27

Page

Bailey v. *Central Vermont R. R. Co.*, 319 U. S. 350, 63 S. Ct. 1062 23

Boston M. R. R. Co. v. *Meech*, 156 F. (2d) 109, (C. C. A. 1st) 23

Brady v. *Southern Ry. Co.*, 320 U. S. 476, 64 S. Ct. 232 ... 8

Ellis v. *Union Pacific Railroad Company*, 329 U. S. 649, 67 S. Ct. 598 22

Freeman v. *Garretts*, (Sup. Ct. Texas) 196 S. W. 506 ... 18, 21

Griswold v. *Gardner*, 155 F. (2d) 333, (C. C. A. 7th) ... 8

Lasagna v. *McCarthy*, ... Utah ..., 177 P. (2d) 734, cert. denied 332 U. S. ..., 68 S. Ct. 204 18

Myers v. *Reading Co.*, 331 U. S. 477, 67 S. Ct. 1334 8

Pauly v. *McCarthy et al.*, 109 Utah 398, 166 P. (2d) 501, reversed without opinion, 330 U. S. 802, 67 S. Ct. 962 23

Waller v. *Northern Pac. Terminal Co.*, 178 Or. 274, 166 P. (2d) 488, cert. denied 329 U. S. 742, 67 S. Ct. 45 18

Winegar v. *Oregon Short Line R. R. Co.*, 77 Utah 594, 298 P. 948 23

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 792

CLYDE WILKERSON,

Petitioner,

vs.

WILSON McCARTHY and HENRY SWAN, as Trustees of The Denver and Rio Grande Western Railroad Company, a corporation,

Respondents.

RESPONDENTS' BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Petitioner's statement of the case is argumentative and incomplete. Since the only question presented by the petition filed in this case is the propriety of the ruling of the trial

court directing a verdict in favor of the respondents, it is considered necessary to set forth the facts in some detail:

This was a suit for damages on account of personal injuries sustained by petitioner at about 10:30 a. m. (R. 40), on July 26, 1945, as a result of a fall into the wheel pit located in the respondents' railroad coach yard at Burnham, in Denver, Colorado. Petitioner was employed as an engine foreman (R. 31) on the 7:00 a. m. to 3:00 p. m. shift (R. 32). His work crew included himself, two switchmen, an engineer and a fireman. Their duties consisted of general passenger car switching in the yard, making up trains, and spotting "bad order" cars for repair (R. 32).

The accident to petitioner occurred within an area enclosed by safety chains and posts on three sides, and by a standard Pullman tourist car on the fourth. The wheel pit was located inside this enclosure. It was constructed in 1942 (R. 73), and consisted of a rectangular shaped pit, 4 feet 2½ inches wide, 10 feet 7 inches deep, with concrete walls, the tops of which were flush with the level of the ground (R. 57, 61). The pit ran underneath three or more parallel tracks with the long axis of the pit approximately east to west and the tracks crossing it from north to south. These tracks were identified as the Wheel Track, on which wheels were brought to and taken away from the pit, and the track next east, known as Track 23½, on which cars were brought to the pit and "spotted" for repair (R. 15, 16).

The safety chains and guard posts surrounding the wheel pit were installed about May 1, 1945, less than three months prior to petitioner's accident (R. 80). When open and in use, the posts and chains enclosed the pit on three sides, north, south and west, by means of four corner posts and a connecting chain, and on the fourth or east side by whatever passenger car happened to be spotted for repair over the pit on Track 23½. The four chain posts were 42 inches in height and fixed in sockets. The safety chain stretched between the posts and fastened 2 inches below the top of the posts or 40 inches above the ground (R. 62). The east chain posts were located 36 inches west of the west rail of Track 23½, and from less than

1 inch to not more than 7 inches from the outside edge of the overhang of whatever car was spotted over the wheel pit. The west chain posts were 16 feet 5½ inches west of the east chain posts, and the distance between the north and south chain posts was 7 feet 6 inches (R. 62).

When the pit was in use, all the cover board for the pit would be removed, except one so-called "permanent board" which was left in place and never taken out. This particular board was made up of several planks bolted together. It was 22 inches wide, 4 feet 2½ inches long, and weighed 75 pounds (R. 57). This board would fit across the pit only at one particular point. The east edge of the board was 9½ inches west of the east safety chain posts or 45½ inches west of the west rail of Track 23½ (R. 57, 64). The carmen assigned to work in the wheel pit required the use of this board in its particular position in their work of changing wheels on the cars spotted over the pit (R. 68-69, 73-74). The board acted as a support to the carmen in getting down in the pit to the hoist located on the pit floor (R. 74); it was used also as a means of getting in and out of the pit (R. 58, 74, 85), as a brace, and if carmen were taking off nuts and bolts while working on a car, the board kept them from falling backwards into the wheel pit (R. 74, 87-88).

This board fitted firmly over the pit (R. 57, 84). At each end of the board there was a steel lip of Z-iron construction (R. 57-58). The Z-iron was secured by a strap of iron over both the top and bottom sides of the board (R. 57-58). The steel lip fitted over the edge of the cement wall of the wheel pit, so as to make it level with the top of the pit wall and the ground (R. 58). The board fitted tight and snug (R. 58, 75); it had no play or wobble in it (R. 75). This board was just a little bit longer than the other boards, so as to make it fit a little tighter because of the fact that the board was used as a brace by the carmen (R. 74, 87-88).

When a car was spotted over the wheel pit on Track 23½ and the safety chains and posts were up and in place, the wheel pit was completely enclosed, except for the narrow space between the east safety chain posts and the side of the

car spotted on Track 23½. The width of this space would vary according to the width of the overhang of whatever car happened to be spotted over the pit—some cars having a wider overhang than others. At the time of the accident to the petitioner, a standard Pullman tourist car was spotted over the pit. If a plumb bob were dropped vertically from the west side of that car to the ground, the distance between the line and the base of the east chain post would be 5 inches and would increase to 7 inches at the top of the post, since the post leaned slightly outward (R. 59). When passenger equipment with a wider overhang was spotted over the pit, the space between the side of the car and the nearest post would be reduced as much as 2 to 6 inches (R. 59-60).

Only one shift of carmen worked at the wheel pit, and that was the day shift (R. 103), whose hours were from 8:00 a. m. to 4:00 p. m. (R. 81). When a car was spotted over the wheel pit for a wheel change, the pit was uncovered and the guard posts and safety chains were put up around the open pit (R. 63, 86). In order for the carmen to perform their work of changing wheels, it was necessary for the entire pit to be open except for the so-called permanent cover board located 9½ inches west of the west rail of Track 23½ (R. 57, 63, 64). Sometimes also, another board 19 inches wide, immediately adjoining the west rail of Track 23½ was left in place (R. 63). The open space between the edges of these two boards would be 22 inches (R. 71). The board adjoining the rail would be taken out or left in place, depending on the repair work being done at the wheel pit (R. 63), but when a car was spotted over the wheel pit, this board next to and adjoining the rail would be completely covered by the overhang of the car (R. 53).

When carmen were not working at the wheel pit, the chain posts and safety chains were removed, all the cover boards were fitted in place, and the pit was completely covered (R. 16, 19-20, 64-65). At such times people would walk back and forth over the cover boards on the pit; it was perfectly safe and proper to do so (R. 20-21).

The injury to the petitioner occurred at a time when the wheel pit was open and all the cover boards were removed except the board immediately adjoining the west rail of Track 23 and the "permanent" board west of the east chain posts (R. 62, 82-83). Carmen were working on the car spotted over the pit (R. 44). The safety chains were up around the wheel pit (R. 36, 44). Petitioner entered the chained area traveling from north toward the south (R. 45, 83). He put his right hand on top of the chain post nearest the car, turned his body sideways so that he faced west, slid through the 5 to 7 inch space between the car and the chain post, and swung his body around the post. He then moved a few inches to the west along the north edge of the pit, turned around and stepped onto the board west of the east chain posts with his right foot (R. 46). He fell into the wheel pit toward the west from the west side of the board (R. 50).

Just before the accident occurred, petitioner had been in the Battery House for a drink of water. The Battery House is located to the north of the wheel pit (R. 40). Petitioner stated that he wanted to secure certain "information" from the carman, Mr. Hawkins, and his helper, who were working on the tourist car spotted over the wheel pit. He admitted that there were several different ways that he could have secured this information, without crossing the board within the area surrounded by the safety chains (R. 43-46). During the trial when asked if it wouldn't have been quicker for him to have gone over or under the safety chains, petitioner replied that the chain was too high at the post to go over, that one would "have to crawl under." When asked why he didn't go over or under the chain, he answered, "because I didn't want to. It wasn't necessary for me to go over the chain" (R. 53-54). At still another point, petitioner conceded that the purpose of the guard chains was to keep people from walking or falling into the open pit (R. 101).

The evidence concerning the claimed use of the cover board by switchmen consisted of testimony by Gordon H. Arbogast and by the petitioner, himself. Arbogast's work

shift at the yards was from 3:00 p. m. until 11:00 p. m., while the shift of the carmen who worked at the wheel pit extended from 8:00 a. m. until 4:00 p. m. So that between Arbogast's shift and the shift of the carmen at the wheel pit there was an overlap of but one hour (R. 19). On direct examination, Arbogast stated that he had observed a practice of switchmen and workmen passing between the safety chain posts and a car standing on Track 23½ (R. 17), but when asked to state the practice, his answer apparently referred to the admitted use made of the cover board by carmen during their work at the wheel pit (R. 17). Arbogast admitted on cross examination that his testimony as to the occasions when men would cross the pit was subject to the limitation that during most of his shift, the carmen were off duty and the safety chains and posts were removed and the pit was entirely covered over (R. 21). At such times people walked back and forth across the boards over the pit and it was perfectly safe and proper to do so (R. 21). Arbogast also stated that he wouldn't dispute the fact that the safety chains and posts were installed around the first part of May 1945, less than three months before the petitioner's accident, and his testimony also would be subject to that limitation (R. 22). In his previous testimony as to the occasions when men would cross the board, he had referred to occasions before the safety chains and posts were installed, and so his testimony also would be subject to that limitation (R. 22). As rebuttal, Arbogast testified that since the installation of the safety chains at the wheel pit he had seen two switchmen, whom he named, pass over the cover board (R. 103-104). According to Arbogast, the reason it was necessary to cross the cover board between the safety chain posts and the car was because otherwise "you would have to walk all the way around the pit, you understand, and poor old switchman that is working there is plenty tired, he don't feel like making lot of extra steps" (R. 15).

The petitioner testified that he had observed "men that work around there, regardless of whether switchmen or carmen," pass over the board when the chains were up and a car was standing over the pit on Track 23½ (R. 37). He first

spotted the tourist car on the wheel track about an hour and a half before his acident on the same morning (R. 101). At that time he crossed the board between the car and the safety chain posts, walking from the south towards the north (R. 37). At that time he saw grease on the board (R. 39), but the board seemed perfectly safe and secure (R. 101). It did not wobble and wasn't infirm; it seemed solid (R. 101). Later that morning at the time of his injury, when he started to cross this board, it felt like there was a pebble or a rock under it (R. 49). But he didn't see a pebble or rock; he didn't examine the board (R. 49). So his statement about a pebble or rock under the board would be just a guess (R. 49). As he began to cross the board, he "just glanced at the position of the board" (R. 98). He noticed one little spot of grease on the board (R. 98), but didn't know whether he slipped on that particular spot of grease or not at that time (R. 99). He didn't notice that he ever stepped into the grease, or whether he really got into the grease (R. 99). He couldn't swear as to whether his foot slipped in the grease (R. 100). He didn't see any grease on the board before he stepped on it, but there was some grease on it (R. 101). As near as he could recollect, the east edge of the board was 10 or 12 inches west of the east safety chain posts (R. 47), at the time he attempted to cross it.

ARGUMENT

I.

THE FEDERAL EMPLOYERS' LIABILITY ACT DOES NOT MAKE THE EMPLOYER THE INSURER OF THE SAFETY OF HIS EMPLOYEES.

For the most part, petitioner's argument in support of his petition for writ of certiorari is devoted to general assertions that there was evidence for the jury on the issue of whether respondents were negligent, and to the citation of a large number of cases decided by this Court in which the necessity of a jury trial has been emphasized unless there is an "absence of probative facts to support the conclusion" reached. It is respectfully submitted that a review of the evi-

dence in the present case will withstand the most rigorous standards laid down by this Court.

The underlying refrain of the petitioner's argument is that because the trial court directed a verdict, petitioner has been denied his "constitutional right" to a jury trial. In other words, in the opinion of petitioner's counsel, *all* Federal Employer Liability Act cases must be submitted to a jury and respondents are, in effect, the insurers of the safety of their employees and subject to an absolute liability. This Court has expressly rejected this contention on numerous occasions. For example, in the recent case of *Myers* v. *Reading Co.*, 331 U. S. 477, 67 S. Ct. 1334, the Court cited the controversial case of *Griswold* v. *Gardner*, 155 F. (2d) 333, (C. C. A. 7th), and expressly rejected the viewpoint therein expressed, in the following language:

> "The respondent is not subject, as has been suggested, to an absolute liability to its employees comparable to that established by a workmen's compensation law."

In view of the petitioner's contentions in the case at bar, the Court's ruling in *Brady* v. *Southern Ry. Co.*, 320 U. S. 476, 64 S. Ct. 232, is especially pertinent. In that case the plaintiff, a brakeman, was injured in a switching movement, in which a freight train was derailed while backing over a closed derailer. Among the acts of negligence alleged against the defendant was the failure to provide a reasonably safe place to work because of alleged defects in the track and derailer. Expert testimony was introduced to the effect that the rail opposite the derailer was so worn that it caused the wheels of the train to rise over the "wrong end" of the derailer, and thus derail the train, which would not have been the case "nine times out of ten if the best type" rail had been in use. Moreover, with reference to the likelihood of cars passing over the wrong end of a derailer, one witness testified that he recalled 3 or 4 such instances, and the Superintendent of the Railroad testified it happened very frequently, that he had seen it happen 25 to 50 times. The Court conceded that the

evidence as to the defective condition of the rail would justify a finding for the plaintiff, if the defective rail was the proximate cause of the derailment and the backing of the train improperly over the closed derailer was a danger reasonably to be foreseen or anticipated, but *held* that the evidence as to the likelihood of such an occurrence was not sufficient to impose a duty upon the Railroad to foresee such an event and guard against the misuse of the derailer. The court said:

> The Supreme Court of North Carolina (222 N. C. at page 370, 23 S. E. 2d at page 338) was of the view that striking a derailer from the unexpected direction "was so unusual, so contrary to the purpose" of the derailer that provision to guard against such a happening was beyond the requirement of due care. With this we agree. Bare possibility is not sufficient. Milwaukee, etc. R. Co. v. Kellogg, 94 U. S. 469, at page 475, 24 L. Ed. 256: "But it is generally held, that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been forseen in the light of the attending circumstances." Events too remote to require reasonable prevision need not be anticipated. It was so held as to an intervening embargo after a delay in transit which was caused by negligence. (Citations.) Liability arises from negligence not from injury under this Act. And that negligence must be the cause of the injury. Tiller v. Atlantic Coast Line R. Co., 318 U. S. 54, 67, 63 S. Ct. 444, 450, 143 A. L. R. 967. Here the rail was sufficient for ordinary use, and the carrier was not obliged to foresee and guard against misuse of the derailer, even though the misuse occurred as often as the evidence indicated. It was the wrongful use of the derailer that immediately occasioned the harm. Decedent had first closed and then opened the derailer on the first movement. He signalled the train to back into the storage track just before the fatal accident. Although this misuse of the derailer was an act of negligence, it

> is mere speculation as to whether that negligence is chargeable to the decendent or another. Without this unexpected occurrence, the adequacy of the rail vis-a-vis a properly used derailer is unquestioned. It was entirely disconnected from the earlier act of the carrier in placing the weak rail in the track. The mere fact that with a sound rail the accident might not have happened is not enough. The carrier's negligence must be a link in an unbroken chain of reasonably foreseeable events.

This Court is, of course, solicitous of its duty of protecting all the rights of all litigants, particularly fundamental rights guaranteed by the federal statutes and the Constitution. But the Court repeatedly has said that the right to have a jury pass upon issues of fact does not include the right to have a cause submitted to a jury in the hope of a verdict where the facts undisputably show that the plaintiff is not entitled to relief. As herein demonstrated, such is the present case.

II.

THE PHYSICAL FACTS AND UNDISPUTED EVIDENCE ESTABLISH NO DUTY ON THE PART OF RESPONDENTS TO ANTICIPATE OR FORESEE THAT THE PETITIONER WOULD CROSS THE WHEEL PIT WITHIN THE AREA ENCLOSED BY THE SAFETY CHAINS.

It may be assumed for the purpose of argument that at the time of his injury, the petitioner was enroute to get certain "information" desired in connection with his work, even though the evidence discloses no necessity for any such mission (R. 43-46, 81, 83). Still the pertinent question is: Was it reasonably foreseeable that the petitioner would squeeze between the guard posts and the side of the car spotted over the wheel pit and attempt to cross the wheel pit by means of the board located within the area surrounded by the safety chains? It is respectfully submitted that both the physical facts and the uncontradicted evidence provide a forceful negative answer to this query.

The physical facts and evidence.

Respondent's Exhibit 2, consisting of a scale model of the wheel pit, safety chains and posts, tourist pullman car on Track 25½ and various other tracks referred to during the trial, is part of the evidence and the record in this case (R. 13). The scale of the model is one foot to a quarter of an inch (R. 13). This model, itself, demonstrates more convincingly than any argument of counsel that the area within the chained enclosure was a restricted territory. Any school child knows that an area thus surrounded by safety chains is a forbidden zone. A railroad man, accustomed to working in hazardous areas, is even more aware of the meaning and warning significance of such a chained enclosure. As is apparent from the model, there is no practicable way that the respondents could have made the area within the chains a safe passageway for switchmen and other employees such as petitioner except by eliminating the wheel pit. Even the petitioner has not suggested this alternative.

The uncontradicted evidence is that the petitioner knew and appreciated the significance of the safety chains and guard posts surrounding the wheel pit. On cross examination he stated the following:

> Q. Mr. Wilkerson, what are these guard chains up here for in your understanding?
>
> A. To keep people from walking directly into the open pit.
>
> Q. Keep people from falling into the pit?
>
> A. Yes sir. (R. 101.)

Equally revealing is the explanation by petitioner's witness Arbogast, as to the necessity for crossing the board by sliding sideways between the safety chain post and the car, because otherwise, he said, "you would have to walk all the way around the pit, you understand, and poor old switchman that is working there is plenty tired, he don't feel like making lot of extra

steps" (R. 15). Actually the "extra steps" would total about 40 feet, taking into consideration the width and the length of both sides of the chained enclosure.

Moreover, the testimony of petitioner shows conclusively that it was not reasonably necessary for him to enter the chained area of the wheel pit in the performance of his work. Other safer and more efficient routes were readily available. When he had walked down on the west side of the car just before his accident to a point just north of the chained enclosure, he could hear the carmen talking under the car. He did not ask the carmen at this point for the "information" he desired, although he conceded that he could have asked them (R. 45). Furthermore, he could have gone around the north end of the car on Track 23½ and down on the east side of the car to the point where he knew the men were working under the car (R. 45) and secured the desired "information." Even after he had gone down on the west side of the car, and had decided he would go around to the other side of the car where he heard the carmen talking, he could have gone around the west end of the wheel pit, outside the chains, and around the south end of the car and then to the east side of Track 23½ (R. 46). Petitioner also conceded that he could have waited for the removal of the blue flag by the carmen, which would have signaled the fact that the carmen were through with their work and the car could be moved off the wheel pit (R. 44). When asked why didn't go over or under the safety chains, petitioner's petulant answer was, "because I didn't want to" (R. 54).

Instead of availing himself of these other apparent means and routes, the petitioner entered the chained area and attempted to cross the wheel pit by means of the narrow opening between the side of the car and the safety chain posts next to and just west of the car. The space was only 5 to 7 inches wide. Passenger equipment with a wider overhang of from 2 to 6 inches also was spotted over the pit for repair (R. 59), and on such occasions the space between the side of the car and the east chain posts would be entirely filled. All of the

witnesses at the trial agreed that at best, it would be a tight squeeze for a man to pass between the side of a Pullman tourist car and the chain post. Petitioner admitted that it was necessary to turn sideways in order to get through (R. 46). Arbogast said that it not only was necessary to turn sideways, but also described how he would "crawl through there now" (R. 23), and at still another place referred to the performance as one where you "slide through" (R. 24). Carman Hawkins, a larger man than petitioner or Arbogast, confirmed the fact that for him it would be a gymnastic accomplishment; there was a possibility it could be done, but it would be a discomfort (R. 96-97).

When the carmen were working at the wheel pit changing wheels and repairing cars it was necessary for the wheel pit to be open and the cover boards removed in connection with their work (R. 61, 68-69, 74). The one exception was the partciular board from which petitioner fell. This board necessarily was kept in place and never removed (R. 87-88), because the carmen needed this board to cross on during their work of removing and applying wheels to passenger cars (R. 74), as a support in getting down on the hoist located on the floor of the wheel pit (R. 74), as a means of getting in and out of the wheel pit (R. 58, 74; 85) and as a brace in case a carman should slip or fall (R. 74, 87-88). It is not disputed that the wheel pit itself was a necessary construction used in connection with the respondents' railroad business, or that the area of the wheel pit was in all respects proper, so far as engineering design and construction were concerned.

How could the respondents possibly have made the area of the wheel pit safe as a passageway for switchmen such as the petitioner? Fully aware of the difficulties of such an undertaking, respondents did the safest thing conceivable under the circumstances—they blocked off the area. By installing the safety chains and posts as a warning, this particular area was zoned off as effectively as was humanly possible consistent with the use made of the wheel pit. The petitioner's counsel obviously realize the difficulty of their position when they attempt to list on pages 31 and 32 of

their brief the various things which respondents might have done in order to make the area within the chained enclosure safe for the petitioner. Although none of these assorted "suggestions" were mentioned in petitioner's complaint or referred to during the trial, the list might be appropriately augmented by the suggestion that the respondents could have stationed guards armed with shotguns and clubs in the vicinity of the safety chains.

No allegations or sufficient evidence to impose notice on respondents with respect to any misuse of the cover board.

Since the area of the wheel pit had been blocked off on May 1, 1945 by the erection of guard posts and safety chains and excluded as a place of work for all persons except carmen who repaired the cars spotted there for that purpose, the petitioner attempts to rescue himself from the force of this situation by pointing to a claimed practice of switchmen crossing the wheel pit subsequent to the installation of the chains and posts. Such a practice, argues the petitioner, imposed notice upon respondents that the cover board was being used as a walkway for a sufficiently long period of time to justify the presumption that respondents consented to or acquiesced in such use.

At the outset, it should be pointed out, that the complaint filed in the trial court is completely devoid of any allegations of negligence such as suggested. The complaint contains no reference either to custom or practice or to any actual or implied notice thereof. Moreover, even if custom and practice were properly pleaded and the evidence thereof relevant under the issues framed, the so-called evidence of misuse of the cover board relied upon by the petitioner in this case falls far short of showing a custom that had existed "so openly and habitually and for a long enough period of time to raise the presumption that the respondents or those appointed by them had consented to the use or acquiesced in it."

In the first place, it should be kept in mind that the safety chains and posts were installed less than three months prior

to petitioner's accident. So that in any event, it cannot fairly be said that a practice was "well established" or "long continued." The evidence relied upon with respect to the so-called custom is contained in the testimony of the petitioner, himself, and of his witness Arbogast. Under questioning by his own counsel, petitioner testified as follows (R. 38):

Q. I will ask you to state whether or not you observed any practice with refernce to crossing over the pit when men were working on the cars there in the daytime before these chains were installed?

A. Walked right straight across the board.

Q. Was there a board usually there to walk over?

A. Yes, sir.

Q. Was there any change in that practice after the chains were installed?

A. None, only they had to walk around the chains.

Q. At any time while you were working in the yards there before you were injured, did you ever receive any instructions from anyone forbidding you to cross over the pit?

A. No, sir.

Q. You may state whether or not you observed men cross over the pit as you have indicated here on more than incidental occasions.

A. Yes, sir.

Q. What did you observe with reference to the number of times the occasions when men would cross over the pit?

A. Oh, I couldn't say; I suppose maybe a hundred times; varies, men, both switchmen and car men or others working there in the yard necessary, pullman, employees and so forth.

Q. Crossed over the pit?

A. Yes, sir, it was a common practice for everybody to use that that way.

As pointed out in the opinion of the Utah Supreme Court, the foregoing testimony is in no way limited as to dates or employees. The petitioner could have been talking about the time before the chains and guard posts were installed, the time after the chains were installed, or both. Also, there is no way of telling how much of the alleged use was by the carmen who must necessarily use the board in connection with their work at the wheel pit, and how much of the claimed use was by other employees such as switchmen.

The other witness Arbogast, attempted several times during the course of the trial to give evidence regarding a supposed custom and practice, but as a witness on rebuttal concluded his testimony in this manner under questioning by petitioner's counsel (R. 103-104):

Q. During the period of time between the installation of these safety chains and posts and the time when Mr. Wilkerson was injured, I will ask you to state whether or not you ever passed over that board at the west of the post by passing between the post and the standing car while that crew was there working?

A. *Yes, sir, I remember of two occasions that I passed through there.*

Q. During that period of time?

A. Yes, sir.

Q. Have you seen any other switchman working there in the yards act similarly; that is, go around the post, between the post and the car and pass over the board?

A. Yes, sir, I have saw my helpers at different times and before the chains were placed, we used the

board at all times, you know, just to cross the pit. I have walked across the pit a number of times that way, and also my helpers.

Q. I am interested in the occasions when the board had been crossed after the chains were installed.

A. *Yes, sir, I have saw fellow by the name of Mason and fellow by the name of * * * that helped me quite a long time.*

Q. They were switchmen?

A. Yes, sir, that crossed the board.

Q. Crossed the board while car was standing over the wheel pit. Did they cross while a car was standing in the wheel pit?

A. Yes, sir.

Thus Arbogast's testimony with respect to claimed custom and practice was left at the low score of two—i. e., two switchmen whom he had seen cross over the board after the safety chains were installed. Usage by employees other than the two is confused between the times before and the times after the installation of the safety chains. Certainly, such evidence is entirely lacking in those elements necessary to show constructive notice of an established custom and practice by acquiescence. It is apparent from all the testimony at the trial that there was no "well established and long continued practice" for switchmen such as petitioner to cross the cover board within the area of the safety chains. Of course, the carmen who repaired cars at the wheel pit necessarily used the cover board in connection with their work, but all of the carmen testified that no one other than themselves had ever been seen using the cover board as a walkway (R. 62, 79, 86, 91). As stated by the Utah Supreme Court in summarizing the foregoing evidence, it "at the most, established a questionable, sporadic and occasional use of the board in the manner contended for, * * * and for a short period of time." This was not sufficient to charge respondents with notice of an unsafe practice.

See also:

Waller v. *Northern Pac. Terminal Co.*, 178 Or. 274, 166 P. (2d) 488, cert. denied, 329 U. S. 742, 67 S. Ct. 45;

Lasagna v. *McCarthy*, ... Utah ..., 177 P. (2d) 734, cert. denied, 332 U. S. ..., 68 S. Ct. 205.

Petitioner seeks to impose a duty on respondents impossible of fulfillment.

There is still a further difficulty in the petitioner's argument and position. If it be assumed contrary to the facts that notice and acquiescence were properly alleged in petitioner's complaint and established by competent evidence, the question is then presented what could or should the respondents have done under the circumstances. Surely, the law does not impose a legal duty which as a practicable matter is impossible of fulfillment. By the soundest and most sensible scheme possible, consistent with the continued use of the wheel pit, the respondents had removed the area within the safety chains from the category of a work place for everyone except carmen. Other employees were excluded by the obvious physical features, including the warning safety chains. Even in the face of explicit notice of habitual violations of the express warning conveyed by the presence of the safety chains, what other reasonable precautions could the respondents have taken? By its inherent nature and design the area of the wheel pit could not have been made safe as a thoroughfare for all of the employees working in the respondent's yard, without dispensing with its necessary function. The law does not impose a duty to make safe that which by its very nature cannot be made safe.

A case directly in point is *Freeman* v. *Garretts*, (Sup. Ct. Texas) 196 S. W. 506. In that case a railroad employee was injured while attempting to mount the brake beam of a box-car being backed toward him to be coupled to another stationary car upon the track. The plaintiff was standing

within the track as the car slowly approached him; when it reached him he caught hold of the grab iron at the end of the car and placed his left foot upon the brake beam. The brake beam shifted to one side throwing his right foot into such a position that it was caught by the car wheel and injured. Plaintiff's purpose in attempting to get up on the brake beam was to ride the car and open the knuckle of the coupler upon it, whereby the coupling with the stationary car could be made. The negligence charged was a defective condition of the brake beam which permitted play to the side, preventing the plaintiff from safely mounting it. Evidence was introduced by the plaintiff of a habitual practice by brakemen of mounting the brake beam from within the track of an approaching car. There also was proof of an express rule by the defendant employer prohibiting the use of the brake beam for such purpose. But the plaintiff contended that the evidence as to habitual use amounted to notice of the practice to the defendant, that therefore the defendant was under the duty of exercising care to see that the brake beam was maintained in proper condition so that it safely could be used by brakemen for this purpose. The case was submitted to the jury upon this theory.

In reversing the judgment of the lower court, the Supreme Court held:

> * * * The plaintiff could have performed the particular duty without getting on the brake beam—either by running ahead the slowly moving car and adjusting the knuckle before it reached the other car, or by giving a signal and causing the car to be stopped while he adjusted the knuckle for the coupling.
>
> It was not possible, in our opinion, for this brake beam to be kept in a condition which would render it safe as a place for one standing upon the track to mount an approaching car. * * * It was plainly a highly dangerous instrumentality for the use which the plaintiff sought to make of it,—a use for which it was in no sense designed, and to which it could not be safely

adapted, however perfect its condition as a brake beam. To say that the defendant was under the duty of keeping such an instrumentality safe as a place to mount an approaching car, would practically require the impossible. The law, with all its regard for the rights of others, does not exact the impossible of any man. It is supposed to be founded upon reason and fairness. Unless it possesses inherently those elements, it does not deserve the name of law and is not the law. It would be manifestly unjust to hold anyone to the duty of making an appliance safe for a given purpose, which, whatever the prudence exercised, could not be made safe for that purpose. We think this is true of a brake beam attempted to be used as the place for mounting an approaching car; and we therefore hold that negligence could not be predicated upon the defendant's failure to make this brake beam safe for such use by the plaintiff upon the occasion which caused his unfortunate injury.

It is a universal rule that an employer is not liable for an injury to the employe which results from the latter's putting an appliance to a wholly improper use. It is recognized that this rule is, in general, subject to qualification where it appears that it was customary for the appliance to be put to the improper use and the employer knew of such custom. But this qualification can have no application to an appliance which is not only wholly unsuited for the improper use which causes the injury but is one which, from its nature, cannot possibly be made safe for such use.

* * * With evidence of the existence of an express rule forbidding the use of a brake beam as the means of mounting an approaching car,—a rule manifestly intended for the protection of the employes,—we decline to hold that even its persistent violation would serve to impose upon the defendant a duty which he could not in reason discharge, and which, if performed

to the fullest possible extent, would in its substantial operation compel him to invite injury to his employes.

If there were anything in this case showing that the plaintiff was required by the defendant to use the brake beam for the purpose to which he attempted to put it, the elements of actionable negligence would be fully presented. But such is not the case. The plaintiff's attempted use of it was purely voluntary, and, as found by the Court of Civil Appeals, its use was not necessary to the work in which he was at the time engaged.

In the case at bar, the wheel pit which petitioner attempted to cross by means of the cover board was obviously and inherently a dangerous place, a place in no sense designed or adapted to the use which petitioner sought to make of it. There were many other equally convenient and efficient routes which petitioner could have used to perform his duties. The wheel pit could not be made safe for the purpose of a thoroughfare for switchmen such as the petitioner. In recognition of this fact, the respondents had installed guard posts and safety chains around the area of danger, comparable to the express safety rule promulgated by the employer in the *Freeman case*. In the case at bar, as in the *Freeman case*, the employee seeks to impose a legal duty upon the employer to make safe that which by its nature could not be made safe, by contending that there was a custom and practice of using the instrumentality in the manner in which the petitioner was using it at the time he was injured. This, the court refused to sanction in the *Freeman case*, on the ground that even evidence of persistent habit and custom of improper use would not serve to impose a duty upon the employer which he could not in reason discharge, and which even if performed to the fullest possible extent would in its actual operation compel the employer to invite injury to his employee.

The evidence makes clear that the carmen who did repair work at the wheel pit required the use of the "permanent" board in its particular location in order to perform their

necessary duties, as was true of the structure of the wheel pit and its appurtenant equipment. So also the particular location of the warning chain and chain posts was necessary in order not to interfere with the car repair work carried on at the wheel pit. Under these circumstances, how could a safe passageway for all persons in the railroad yard be created over the wheel pit? It was a place of obvious danger; the pit was of considerable depth, lined with concrete, and contained hoisting machinery. There would be no feasible way of making this complicated and dangerous area into a passageway safe for general use, without destroying the very purpose of the wheel pit.

The several cases cited by petitioner miss the point. The case of *Ellis* v. *Union Pacific R. Co.*, 329 U. S. 649, 64 S. Ct. 598, is not in point for the reason that in that case there was conflicting testimony and inferences as to whether the petitioner had been furnished a safe place to work and as to whether an engineer had acted negligently. The petitioner was caught during a switching operation between a box car and the side of a building in a space where there was an impaired clearance. At the point where the accident occurred "the situation was deceptive because the overhang of the car on the curve and its tilt toward the building resulting from a higher outside rail, reduced clearance materially. In fact, the place where petitioner was standing was the one short segment of the arc of the curve where clearance was insufficient. Petitioner was unfamiliar with the area and its hazards; if there was a sign warning of the danger, he did not see it." There was evidence that the engineer was negligent in failing to perceive the peril in time to avert the accident by a warning or by stopping the engine. In view of these facts, the Court held that the issues should be submitted to a jury. In the case at bar, however, no evidence of either a deceptive condition, unfamiliarity with the area or hazards, lack of warning, or negligence upon the part of a fellow employee are involved. On the contrary, the area where the accident occurred and its hazards was well known to the petitioner and the existence of the safety chain was

a patent warning of which the petitioner knew and appreciated the significance. Under the circumstances, it could not reasonably be anticipated that petitioner would ignore the warning, attempt to slide around the erected barrier and negotiate his way over the board within the chained area.

The cited case of *Winnegar* v. *Oregon Short Line R. Co.*, 77 Utah 594, 298 P. 948, does not remotely resemble the case at bar. In that case, the plaintiff, a car inspector, was injured when struck by a cut of cars which was unexpectedly and without warning "kicked" into a track adjoining where plaintiff was working. In his complaint, the plaintiff alleged that the defendant was negligent in failing to give warning of the movement contrary to a custom and practice to do so. Defendant denied the existence of any such custom of warning and conflicting evidence thereof was introduced by both sides. The court properly held that the disputed issue should be resolved by the jury. In the case at bar on the other hand, the question involved is not whether there was a negligent operation of cars by a train crew, but whether under the physical facts and undisputed evidence the petitioner's accident was reasonably foreseeable, and also whether there was sufficiently substantial evidence of the claimed misuse of the cover board at the wheel pit to charge respondents with knowledge of and acquiescence therein.

The other cases cited by petitioner, i. e., *Bailey* v. *Central Vermont R. R. Co.*, 319 U. S. 350, 63 S. Ct. 1062; *Pauly* v. *McCarthy et al.*, 109 Utah 398, 166 P. (2d) 501, reversed without opinion, 330 U. S. 802, 67 S. Ct. 962, and *Boston M. R. R. Co.* v. *Meech*, (C. C. A. 1), 156 F. (2d) 109, are all cases which pose the question whether the particular place where the plaintiff was injured was a place of work which the railroad was under a duty to make safe. In each case, it was held that there was sufficient evidence from which it reasonably could be found that the employee had duties and work which he was obliged to perform at the place where he was injured, thereby rendering that particular *locus* a place of work. In the present case on the other hand, the petitioner had no necessary

duties to perform within the area enclosed by the safety chains; under no circumstances was the area ever designed as a place of work for switchmen; by installation of the safety chains the respondents had taken all precautions reasonably possible to warn employees such as petitioner of this obvious fact; and there was no practicable way that respondents could have made the area safe for general use as a passageway, without dispensing with the required use of the wheel pit.

III.

THERE IS NO EVIDENCE THAT PETITIONER FELL FROM THE COVER BOARD BECAUSE OF ANY NEGLEGINCE ON THE PART OF THE RESPONDENTS.

If, as the respondents contend, there is no evidence that they were under any duty to foresee that the petitioner would attempt to squeeze between the guard post and the side of the car spotted over the wheel pit and attempt to cross the cover board within the area surrounded by the safety chains, that of course is conclusive, so far as this case. But regardless of the unforseeability of the accident and injury to the plaintiff, the fact is there was no evidence that the cover board from which petitioner fell was in any respect defective or insufficient.

The evidence is uncontradicted that the particular cover board from which the petitioner fell will fit over the wheel pit at only one place (R. 88). It always remains in place and is never removed (R. 63). The carmen working at the wheel pit need this board at this particular location in connection with their work (R. 58, 74, 85, 87-88). The board fits firmly over the pit (R. 57, 84). It weighs about 75 pounds (R. 88) and is 22 inches wide (R. 57). At each end of the board there is attached a steel lip of Z-iron construction (R. 57-58). The Z-iron is secured by a strap of iron over both the top and bottom sides of the board (R. 57-58). The steel lip fits over the edge of the cement wall of the wheel pit, so as to make it flush

with the top of the ground (R. 58). The board fits snugly in place (R. 58, 75); it has no play or wobble in it (R. 75). It is just a little bit longer than the other boards, so as to make it fit a little tighter because it is used as a brace (R. 74, 87-88).

According to petitioner's own testimony, he crossed the board about an hour and a half before his accident on the same morning (R. 101). At that time he saw grease on the board (R. 39), but it seemed perfectly safe and secure (R. 101). It did not wobble and wasn't infirm; it seemed solid (R. 101). When he started to cross the board on the occasion of his injury, it felt like there was a pebble or rock under it (R. 49). But he didn't see any pebble or rock and didn't examine the board (R. 49). So his statement about a pebble or rock under the board would be just a guess (R. 49). He fell toward the west off the west side of the board (R. 50). As he began to cross he "just glanced at the position of the board" (R. 98). He noticed one little spot of grease, but doesn't know whether he slipped on that particular spot of grease or not at that time (R. 99). He didn't notice that he ever stepped into the grease, or whether he really got into the grease (R. 99). He couldn't swear as to whether his foot slipped in the grease (R. 100). He didn't see any grease on the board before he stepped on it (R. 100).

Hawkins, a carman, who was working at the wheel pit came out of the wheel pit just a few minutes before petitioner was injured (R. 83). He stepped onto the cover board. The board was firm, and free from oil as far as he could see (R. 84). The wheel pit was cleaned regularly about twice a week for the purpose of eliminating grease and oil (R. 90). It was to Hawkins' advantage to keep grease and oil off the board, because otherwise he might take a tumble into the wheel pit himself (R. 90). Up to the time that petitioner was hurt, Hawkins had never seen any oil on the board (R. 93). During the past two years that Hawkins had worked at the wheel pit, he had seen oil on the board once. That was in February, 1946 (R. 92), or approximately eight months *after* the date of Wilkerson's accident. There was a practice of keeping oil

off the board (R. 92), and to Hawkins' knowledge there had been oil on the board only on this one occasion referred to (R. 93). After petitioner's accident the board was in continuous use until August 12, 1916, when it was removed from the wheel pit (R. 60, 93) and brought to Salt Lake as an exhibit in this case.

The complaint filed in this case specifically alleged that respondents were negligent in that they failed to provide a safe or substantial covering over the top of the wheel pit, but on the contrary, caused to be placed over the wheel pit a loose plank which was not firmly set, affixed or attached to the sidewalls of the pit, and that due to insecure fastening and installation of the plank, footing was insecure and infirm and the plank would and did turn and shift as men were walking over it; also that respondents had caused and permitted grease, oil and other slippery substance to accumulate and remain upon the plank, and that as petitioner stepped upon it while crossing over the pit, due to the narrow width of the plank and the grease and oil thereon, he was caused to slip, lose his balance and fall to the bottom of the wheel pit and thereby sustain the injuries complained of (R. 1-5).

It is respectfully submitted that there is not a single one of these allegations which has any evidentiary support. The testimony above set forth demonstrates without contradiction that the cover board over the wheel pit was substantial, firmly set, affixed, attached and secured to the sidewalls of the pit. Petitioner, himself, confirmed this fact when he crossed the board about an hour and a half before his accident (R. 101). His statement, that when he crossed the board at the time of his accident it felt like there was a pebble or rock under the board which caused it to tilt, was admittedly "just a guess" on his part (R. 49). The testimony likewise demonstrates, without contradiction, that grease, oil and other slippery substance had not accumulated or remained on the cover board. At the most, the evidence favorable to the petitioner consists of his own statement that at the time of his accident he "just glanced at the board" and noticed one little spot of

grease. But he didn't know whether he slipped on that particular spot of grease or not (R. 99). The record contains not a shred of testimony to the effect that grease or oil ever had been allowed to accumulate on the board or that it was in any manner defective or insecure.

CONCLUSION

It is submitted that the trial court necessarily and properly granted the respondents' motion for a directed verdict in this case in view of the undisputed physical facts and the uncontradicted evidence. Any other ruling would have required a holding that an employer is an absolute insurer of the safety of his employees under any and all circumstances. The petition for writ of certiorari therefore should be denied.

Respectfully,

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DENNIS McCARTHY,
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 53 53

CLYDE WILKERSON,

Petitioner,

vs.

WILSON McCARTHY and HENRY SWAN, as Trustees of The Denver and Rio Grande Western Railroad Company, a corporation,

Respondents.

RESPONDENTS' PETITION FOR REHEARING

WALDEMAR Q. VAN COTT,
DENNIS McCARTHY,
Attorneys for Respondents.

INDEX

SUBJECT INDEX

	Page
PRELIMINARY STATEMENT	1
ARGUMENT	3
I. ASSUMING THAT THE BOARD ACROSS THE PIT WITHIN THE CHAINED AREA WAS USED AS A WALKWAY BY ALL EMPLOYEES, WHAT COULD OR SHOULD RESPONDENTS HAVE DONE?	3
II. THE RECORD IN THE TRIAL COURT CONTAINS NO EVIDENCE OF ANY DEFECT OR INSUFFICIENCY IN THE CONDITION OF THE BOARD	6
CONCLUSION	9

CASES CITED

Brady v. Southern Ry. Co., 320 U. S. 476, 64 S. Ct. 232	6
Coray v. Southern Pacific Company, 335 U. S. , 69 S. Ct. 275, 276	6
Freeman v. Garretts, (Sup. Ct. Tex.), 196 S. W. 506	6

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PRELIMINARY STATEMENT

The above named respondents respectfully submit this, their petition for rehearing in the entitled cause. As the Court is aware, five separate opinions were rendered in this case on January 31, 1949. The majority opinion written by Mr. Justice Black reversed the judgment of the Supreme Court of Utah and remanded the case for another trial. The effect of the Court's decision was to hold that the trial court erred in granting a motion for a directed verdict for the respondents. In

the course of its opinion, this Court decided: (1) That the facts of the case presented a conflict in the evidence with respect to the issue of whether after the erection of the guard posts and safety chains the pit workers alone continued to use the board across the pit as a walkway or whether employees generally so used it (page 7 of Mr. Justice Black's opinion); (2) that, assuming a jury resolved the foregoing question in favor of the petitioner, then, as indicated by the Utah Supreme Court, a jury question was presented "on the condition of the board and the adequacy of the enclosure." But the majority opinion of the Court disregarded and left unresolved two of the chief contentions of the respondents. A decision on either of these contentions in a manner favorable to respondents would require an affirmation of the ruling of the trial court in this case.

The first question left undecided by the Court consists of the following proposition: Assuming that the "very narrow conflict in the evidence" stated by the Court were resolved in the petitioner's favor, and that employees, generally, in the respondents' yard continued to use the board within the chained area as a walkway, then what could or should the respondents have done under the circumstances? Did the situation impose an "additional" duty upon the respondents which they failed to discharge? If so, in what did the "additional" duty consist? Was it a duty possible of fulfillment under the physical facts and circumstances disclosed by the undisputed evidence? The answers to these queries involve an issue of law, not of fact, and this Court's opinion omits any determination of it. Respondents' argument in connection with this contention is set forth under subdivision 1 hereinafter.

The second question left undecided by the Court's majority opinion is as follows: Assuming that all employees used the board within the chained area as a walkway did a conflict of evidence exist with respect to "the condition of the board"? With respect to this question, the petitioner is limited to the particular allegations of negligence set forth in his complaint as filed in the lower court. An independent and impartial examination of these allegations and of the evidence adduced in support thereof will demonstrate conclusively that there

is no evidence of any defect or insufficiency in the condition of the board, notwithstanding statements in the opinion of the Utah Supreme Court apparently to the contrary. Respondents' argument in connection with this contention is set forth under subdivision II hereinafter.

If there is merit to either of the two foregoing contentions, then respondents are entitled to an affirmance of the decision of the lower court, regardless of the "very narrow conflict of evidence" noted in the Court's majority opinion. Since neither of these contentions were determined by the Court in the several opinions filed, it is respectfully submitted that this petition for rehearing should be granted, in order that a full disposition may be made of all the points at issue in this important case.

I

ASSUMING THAT THE BOARD ACROSS THE PIT WITHIN THE CHAINED AREA WAS USED AS A WALKWAY BY ALL EMPLOYEES, WHAT COULD OR SHOULD RESPONDENTS HAVE DONE?

The Court's majority opinion holds that a very narrow conflict of evidence existed for the jury to resolve with respect to "the continued use of the board as a walkway after erection of the chains . . .", that is, "whether the pit workers alone continued to use it as a walkway, or whether employees generally so used it" (page 7 of the majority opinion). But assuming the accuracy of the above statement and that the stated conflict were resolved in favor of the petitioner, there still remains the vital question of what could or should the respondent have done under the circumstances?

Presumably, the standard of conduct for the respondent is that of the ordinary prudent man under the same or similar circumstances. Thus, the prudent man is faced with the following practical problem. He maintains a pit which is indispensable to the operation of his business. In order for the men who work in the pit to do their work, it is necessary for a board to be maintained at a designated point across the pit. Not only do the pit men require the use of this board, but employees

generally have been accustomed to cross the pit by means of this board. Under these circumstances, how can the average prudent man give warning to his employees of the dangers involved in this physical structure and still continue to use the pit for the necessary purposes of his business? Shall he eliminate the pit altogether? If he did so, he undoubtedly would have to discontinue his business. Shall he construct a solid barricade around the pit? If he did that, the work of the pit men would be made impossible. Shall he post warning signs or issue verbal or written instructions? Experience has taught him that employees frequently forget or disregard such warnings. Finally, he determines that the most logical and feasible solution is to erect guard posts and safety chains completely surrounding the pit area, thus effectively blocking off the approach to the board which had been used as a passageway. The posts and chains then act not only as an obvious warning and barricade to all employees who approach the board, but they are so erected that the pit men still can do their work at the pit with a minimum of interference. Up to this point, can it possibly be said that the prudent man has failed to live up to reasonable standards of ordinary care for the safety of his employees?

The problem facing the respondents in the case at bar was met and solved in exactly the manner outlined. Since railroad cars had to be moved on and off the pit for a wheel change, the safety chains had to be erected so as not to interfere with that movement. Also, the guard posts next to the car on the pit had to be placed so as not to interfere with the movement, when cars with an unusually wide overhang were brought to and from the pit. When cars of the latter type were on the pit, no gap at all existed between the chain posts and the side of the car. In no instances was the gap ever wider than 5 to 7 inches (R. 59-60). At all times when the pit was in use the safety chains extended directly across and thereby blocked the approach to the 22 inch "permanent" board over the pit. What other reasonable precautions could the respondents have taken, consistent with the continued use and operation of the wheel pit within the railroad yards?

Is the situation changed by reason of the fact that even after the erection of the guard posts and safety chains, the

respondents receive "constructive notice" that some employees, including switchmen working in the yard, persist in continuing to use the board as a passageway? Such "customary" use consists in a person squeezing sideways between the 5 to 7 inch gap which sometimes existed, moving sideways along the edge of the pit to the position of the "permanent" board, then swinging across the pit over the board, and around the chain post located on the opposite side (R. 46). Do these facts alter the measure of respondent's duty? If so, what other reasonable measures could or should the respondents have taken?

The answer to these queries is not to be found in the petitioner's complaint. Except for some feeble suggestions in his briefs on appeal to the effect that the guard posts and chains should be removed during daylight hours or that an armed guard should be stationed in the area, the petitioner never has advanced a single feasible suggestion as to what "additional measures" the respondents could or should have taken under the circumstances stated. The opinion of the Utah Supreme Court fails to suggest any "additional measures" that could or should have been taken. And the five opinions rendered by this Court are equally silent in this respect. The only logical answer is that no other reasonable measures remained that could be taken by respondents, except to fill up the pit and discontinue a necessary part of their business. As demonstrated by all the evidence, it would be contrary to reason and common sense to impose any further duty upon the respondents, in addition to the affirmative steps which already had been taken. There must be some point short of discontinuing essential operations connected with his business, beyond which the duty of the reasonably prudent employer does not extend. Surely the law does not require the unusual, the unfeasible or the impossible—even from an employer under the Federal Employers' Liability Act.

The physical facts as indicated by the model introduced as an exhibit in the case, the photographs in the record (R. 132A, 132B), and the uncontradicted testimony of all the witnesses at the trial, make it abundantly clear that the area of the wheel pit when blocked off by safety chains and guard posts was in no sense designed or intended as a passageway for employees. Any other inference from the evidence simply

would not make sense. The wheel pit was of considerable depth, lined with concrete, and filled with hoisting machinery. The area was clearly and inherently a dangerous and hazardous one. Without destroying the very purpose and function of the pit and its appurtenant equipment, there was no way that the area possibly could be made safe as a passageway for *all* employees in respondents' yard. To impose such a duty upon respondents would be to impose a duty practicably impossible of fulfillment. The law does not exact the impossible.

Reason and common sense still must be the final standard of action and opinion at law, as well as in other rules governing the conduct of human relations. Mere "custom" under the circumstances of the present case, surely is not sufficient to impose upon the respondents a duty to make safe an appliance which by its very nature can not be made safe for a purpose wholly contrary to its intended function and design. In other, though similar circumstances, this Court refused to hold a railroad company liable for an injury to an employee resulting from the striking of a derailer from an unexpected direction, where the striking of the derailer was "so contrary to the purpose" of the derailer that provision to guard against such happening was beyond the requirement of due care, though there existed evidence of a "custom" to the effect that striking the derailer from an unexpected direction had "happened very frequently" and that it had "happened 25 to 50 times". *Brady* v. *Southern Ry Co.*, 320 U. S. 476, 64 S. Ct. 232; again, see *Freeman* v. *Garretts*, (Sup. Ct. Tex.), 196 S. W. 506. To hold under the facts of this case that the "custom" of forcing a passageway through the narrow space which sometimes existed between the guard posts and a car standing on Track 23½ would impose some additional, unalleged, unspecified, and unknown duty upon the respondents, other than the precautionary measures previously taken, indeed, would be a resort to "dialectical subtleties". Such type of reasoning has been expressly condemned by this Court. *Coray* v. *Southern Pacific Company*, 335 U. S. , 69 S. Ct. 275, 276.

II

THE RECORD IN THE TRIAL COURT CONTAINS NO EVIDENCE OF ANY DEFECT OR INSUFFICIENCY IN THE CONDITION OF THE BOARD.

After determining that the issue of whether the board located within the chained area had been used as a walkway by all employees was a matter for the jury, the Court then quoted with approval the following statement from the opinion of the Utah Supreme Court:

> "It must be conceded that if defendants knew or were charged with knowledge that switchmen and other workmen in the yard were habitually using the plank as a walkway in the manner claimed by plaintiff, then the safety enclosure might be entirely inadequate, and a jury question would have been presented on the condition of the board and the adequacy of the enclosure."

Further language of the Utah Supreme Court also was quoted to the effect that under different facts, maintenance of a "22 inch board for a walkway, which is almost certain to become greasy or oily, constitutes negligence." This Court indicated its general agreement with the foregoing quotations.

But with due deference to the quoted dictum from the opinion of the State Supreme Court, and of this Court's apparent approval thereof, the respondents respectfully request this Court to examine the pleadings and the record in this case, independently of the views expressed by the Utah Supreme Court. After all, the query is not whether the Utah Supreme Court was right or wrong, but whether the trial judge who heard the witnesses and examined the physical evidence properly directed a verdict.

The complaint in this case alleges that respondents were negligent in the following particulars and in no others, namely, that the pit boardway (1) was not firmly set, (2) was not securely attached, and (3) although only about 20 inches wide, the boardway had been permitted to become greasy, oily, and slippery, thereby causing petitioner to lose his balance, slip, and fall into the pit (page 1, majority opinion by Mr. Justice Black).

No contention is made by the petitioner or anyone else that allegations (1) and (2) above, are in any manner supported by the evidence. In fact, all the evidence is affirmatively to the contrary. Presumably, the petitioner abandoned any

contentions based on these allegations, both in the trial court and in the later appellate stages of the case. Neither do the allegations of the complaint in any manner specify, nor does the evidence in any respect suggest, any "inadequacy of the enclosure," as such, notwithstanding language intimating otherwise in the opinion of the Utah Supreme Court. There remains, therefore, only the single allegation referring to the condition of the board and whether grease and oil had been allowed to accumulate thereon. Was there any substantial evidence sufficient to make a question for the jury on this issue?

An examination of the record will disclose not a single shred of evidence which in any manner supports this allegation. The uncontradicted evidence was that the board over the pit fitted firmly (R. 57, 84). It weighed about 75 pounds (R. 88) and was 22 inches wide (R. 57). At each end of the board a steel lip of Z-iron construction was attached (R. 57-58). This steel lip fitted over the edge of the cement wall of the wheel pit so as to make it flush with the top of the ground (R. 58). The board fitted snugly in place (R. 58, 75); it had no play or wobble in it (R. 75). It was just a little bit longer than the other boards, so as to make it fit a little tighter because it was used as a brace (R. 74, 87-88). According to petitioner's own testimony, he crossed the board about an hour and a half before his accident on the same morning (R. 101). At that time he saw grease on the board (R. 39), but it seemed perfectly safe and secure (R. 101). It did not wobble and wasn't infirm; it seemed solid (R. 101). When he started to cross the board on the occasion of his injury, it felt like there was a pebble or rock under it (R. 49). But he didn't see any pebble or rock and didn't examine the board (R. 49). So his statement about a pebble or rock under the board would be just a guess (R. 49). As he began to cross, he "just glanced at the position of the board" (R. 98). He noticed one little spot of grease, but didn't know whether he slipped on that particular spot of grease or not (R. 99). He didn't notice that he ever stepped into the grease, or whether he really got into the grease (R. 99). He couldn't swear as to whether his foot slipped in the grease (R. 100). He didn't see any grease on the board before he stepped on it (R. 100).

Hawkins, a carman, assigned to work in the wheel pit, came out of the pit just a few minutes before petitioner was injured (R. 83). He stepped onto the cover board and over the safety chain in leaving the pit. The board was firm and free from oil as far as he could see (R. 84). The wheel pit was cleaned regularly about twice a week for the purpose of eliminating grease and oil (R. 90). It was to Hawkins' advantage to keep grease and oil off the board, because otherwise he might take a tumble into the wheel pit himself (R. 90). Up to the time that petitioner was hurt, Hawkins had never seen any oil on the board (R. 93). During the past two years that Hawkins had worked at the wheel pit, he had seen oil on the board once. That was in February, 1946 (R. 92), approximately eight months *after* the date of petitioner's accident. There was a practice of keeping oil off the board (R. 92), and to Hawkins' knowledge there had been no oil on the board except on this one occasion referred to, some time after the accident to petitioner (R. 93). Subsequent to petitioner's accident, the board was in continuous use until August 12, 1946, when it was removed from the wheel pit (R. 60, 93) and brought to Salt Lake City as an exhibit in this case. The board was introduced in evidence during the trial of the case (R. 108) and was examined by the trial judge. It was in the same condition at the trial, as at the time of the petitioner's accident (R. 60, 87).

On the basis of the foregoing testimony, undisputed and uncontradicted, the trial judge held that even if the so-called "permanent" board was "customarily" used as a passageway by all employees, there was insufficient evidence from which any inference of negligence could be made by a jury with respect to the condition of the board. Regardless of contrary intimations in the opinion of the Utah Supreme Court, it is respectfully submitted that an independent examination of the record by this Court will confirm the judgment of the trial court. Respondent submits that, in this respect, it is entitled to this Court's independent appraisal and opinion.

CONCLUSION

It is apparent from the five separate opinions filed, that this case was an occasion for considerable discussion and

divergence of viewpoint between the members of the Court. In the concurring opinion of Mr. Justice Douglas, the Court went so far as to take the opportunity "to account for our stewardship" in the entire group of cases heretofore considered by the Court arising under the Federal Employers' Liability Act. Certain it is that the several opinions of the Court will be read with great interest and "perspicacity" by the lower courts and the profession.

In view of the foregoing considerations, respondents respectfully request that a rehearing be granted, not only for the further benefit and guidance of the lower court upon a retrial of this particular case, if a retrial is decided to be necessary, but also in order to give the bench and bar at large a full exposition and decision with respect to all the essential issues necesarily involved in the case.

Respectfully,

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Attorneys for Respondents.

CERTIFICATE

Dennis McCarthy, one of the attorneys for the respondents, hereby certifies that the foregoing Petition for rehearing is presented in good faith and not for the purpose of delay.

DENNIS McCARTHY,